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No. (1)

In The
Supreme Court of the United States

WFMJ TELEVISION, INC.,
Petitioner,

v.

CATHERINE BOSLEY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. MARBURGER
Counsel of Record
MATTHEW J. CAVANAGH
BAKER & HOSTETLER LLP
3200 NATIONAL CITY CENTER
1900 EAST NINTH STREET
CLEVELAND, OHIO 44114
(216) 621-0200

Counsel for Petitioner

November 26, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1st question presented.

In Kokkonen v. Guardian Life Ins. Co.,[1] this Court ruled that a federal district court has no power to enforce a private settlement agreement after unconditionally dismissing a civil suit with prejudice.

Here, upon notice by defendant WFMJ (petitioner here) of an effective out-of-court oral settlement, the district court *sua sponte* dismissed the suit with prejudice and *sua sponte* retained continuing jurisdiction to resolve future disputes over settlement. The court did not order the parties to settle, or to abide by any terms, nor did the court adopt any settlement terms in its order.

Later, the plaintiffs moved the court to enforce settlement, and then unconditionally withdrew the motion. They separately moved to vacate the dismissal, and to set the case for trial. WFMJ didn't oppose.

The court then ordered the parties to appear for an evidentiary hearing on settlement, which it conducted. Three months later, the court ordered WFMJ to comply with the plaintiffs' version of the purported oral settlement.

The Sixth Circuit affirmed.

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[1] 511 U.S. 375 (1994).

Although the Sixth Circuit concluded that "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion," the court ruled that the district court had continuing jurisdiction after that to order the settlement.

Where a dismissal with prejudice does not order the parties to settle or to abide by any settlement terms, but contains a bare and unsolicited recital of continuing jurisdiction over settlement disputes, does a district court have the power to enforce settlement? Even after the parties withdraw all requests for that enforcement?

2d question presented.

In dicta, Kokkonen suggested that a district court could retain continuing jurisdiction to enforce settlement of a dismissed suit if the parties agreed to it. Here, the defendant WFMJ (petitioner here) advised the district court of an "effective" out-of-court oral settlement. No party sought a dismissal. The next day, the district court *sua sponte* dismissed the suit with prejudice and *sua sponte* recited that it retained continuing jurisdiction over future settlement disputes.

The parties had not agreed among themselves that the district court would be the final arbiter of settlement disputes, and did not ask the district court to retain that authority. About six months later, the district court ordered WFMJ to comply with the plaintiffs' version of purported settlement terms.

Does Kokkonen authorize district courts to retain jurisdiction over settlement by *sua sponte* dismissing the case with prejudice and *sua sponte* retaining jurisdiction over settlement?

PARTIES TO THE PROCEEDING

Petitioner WFMJ Television, Inc. was a defendant in the district court and an appellant in the court of appeals. John Urchak and Michelle Nicks were both defendant-appellants below, and are therefore respondents here under Rule 12.6.

Respondents Catherine Bosley and Richard Brown were plaintiff-appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioner WFMJ Television, Inc. is a closely held company. It has no publicly held parent companies or subsidiaries. No publicly held company owns any WFMJ Television, Inc. stock.

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Petitioner WFMJ Television, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a-22a) is unreported. The district court's order enforcing settlement (App. 23a-44a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 13, 2007. On October 12, 2007, Justice Stevens granted WFMJ's application for an extension of time to file its petition for certiorari by November 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. art. III, § 2, cl.1 provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, [and] . . . to Controversies . . . between Citizens of different States . . .

PRELIMINARY STATEMENT

I. Backdrop: the rapidly changing role of federal district judges from focusing on adjudicating to focusing on settlement.

Since the advent of the Federal Rules of Civil Procedure, the federal judiciary has experienced a sea change in the role of district court judges, shifting from adjudicators of civil cases to getting them settled.

The Rules went from saying nothing about district court judges fomenting settlement to authorizing district judges in 1993 to require the parties and their lawyers to attend settlement conferences conducted by the court.[2]

While the number of cases, the number of federal judges, and the number of federal magistrate judges have grown, the number of federal civil trials has dropped steeply.[3] When the Rules took effect in 1938, federal judges tried over 19% of their civil cases. In 2003, they tried 1.7%.[4]

The sharpest drop has been since 1985. The number of federal civil trials dropped by two-thirds

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[2] J. Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 610-613 (2005).

[3] M. Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1256-1258 (2005).

[4] Galanter, 57 Stan. L. Rev. at 1258-1259.

from a high of 12,750 in 1985 to 4,206 in 2003.[5] During that period, the number of settled cases has gone up substantially.[6]

Observers say that the shift in emphasis from adjudicating to negotiating settlement has caused the "vanishing trial."[7] "Good judges" have become those who promote settlement instead of adjudication, Yale Law Professor Judith Resnik opines.[8]

The shift to "a settlement culture," as one federal judge calls it, where settlement is "the central goal of our federal court processes" has stirred controversy within the federal judiciary and a mass of scholarly debate.[9]

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[5] Galanter, 57 Stan. L. Rev. at 1260.

[6] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 638 & n.180; Galanter, 57 Stan. L. Rev. at 1265-1266; M. Galanter & M. Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1340 (1994).

[7] Galanter, 57 Stan. L. Rev. at 1264-1266; Resnik, 80 Notre Dame L. Rev. at 638; Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. Miami L. Rev. 173, 188-91 & n.84 (2004).

[8] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 618.

[9] *Delaventura v. Columbia Acorn Trust*, 417 F.Supp.2d 147, 150 n.4 (D. Mass. 2006) and articles cited in n.4; *e.g.*, *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc), 657-663 (Posner, J., dissenting), 662 (Coffey, J., dissenting), 663-664 (Easterbrook, J., dissenting), 666-671 (Manion, J., dissenting); *In re NLO, Inc.*, 5 F.3d 154, 157-158 (6th Cir. 1993);

Much of that debate has centered on whether the judiciary's legitimate interest in effecting settlements should relax some of the strictures on courts as an institution. This Court entered that debate in 1994 with three unanimous decisions: U.S. Bancorp Mtge Co. v. Bonner Mall Partnership,[10] Digital Equip. Corp. v. Desktop Direct, Inc.,[11] and Kokkonen v. Guardian Life Ins. Co.[12]

In U.S. Bancorp, the Court held that the parties' agreement to settle while on appeal did not justify vacating the contested district court judgment. Recognizing that "[j]udicial precedents are ... valuable to the legal community as a whole," the Court said that the "mere fact that the settlement agreement provides for vacatur" doesn't require the district court to vacate its judgment.[13]

In Digital Equip., the parties negotiated a settlement, causing the plaintiff to dismiss its suit

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J. Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982); O. Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984); M. Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L. J. 9 (1997); Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593 (2005); J. Parness, *American General Jurisdiction Trial Courts: New Visions, New Guidelines*, 55 Univ. Kan. L. Rev. 189 (2006).

[10] 513 U.S. 18 (1994).

[11] 511 U.S. 863 (1994).

[12] 511 U.S. 375 (1994).

[13] 513 U.S. at 26, 29.

voluntarily. Later, the plaintiff moved to vacate the dismissal and rescind the settlement contract, which the district court granted.

The defendant appealed immediately, arguing that its interest in the benefit of its bargain – avoiding trial – allowed it to appeal under the collateral order doctrine, thus relaxing the "final decision rule" for appellate jurisdiction.[14] This Court disagreed, ruling that "a refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under [28 U.S.C.] §1291."[15]

In Kokkonen, this Court decided that a federal district court does not have jurisdiction to grant a motion to enforce settlement filed by one of the parties after they had stipulated to dismiss the suit with prejudice unconditionally.

The Court reversed the court of appeals' decision, which rested on the conclusion that the policy favoring settlement justified the district court's assumption of jurisdiction.[16] The Court concluded that state court, not federal court, was the proper forum for the parties' contract dispute, a matter of state law.[17]

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[14] 511 U.S. at 867.

[15] 511 U.S. at 884.

[16] *Kokkonen*, No. 92-16628, 1993 WL 164884 at *1 (9th Cir. 1993).

[17] 511 U.S. at 382.

The Court's opinion included advisory dicta that has sparked this petition and yielded considerable disarray among the decisions of the federal courts.

II. The dicta of Kokkonen.

Kokkonen focused most on the kind of ancillary jurisdiction that gives federal courts jurisdiction to effectuate their own judgments and to vindicate their authority. The Court decided that ancillary jurisdiction didn't attach to enforcing settlement merely because dismissing the federal suit was part of the consideration for the parties' settlement contract.[18] The Court ruled that enforcing settlement wasn't necessary to effectuate the district court's order of dismissal.[19]

But in dicta, the opinion advised that, "[i]f the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement," they could do that in either of two ways.[20]

One would be to ask the court to embody the terms of the settlement in the dismissal order.[21] The other, mentioned parenthetically, would be for the parties to stipulate in the order that the court was "retaining

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[18] 511 U.S. at 380.

[19] 511 U.S. at 380-381.

[20] 511 U.S. at 381 (emphasis in original).

[21] 511 U.S. at 381.

jurisdiction" over the settlement agreement.[22] Equating those two scenarios, the Court opined that either would give the district court ancillary jurisdiction to enforce the settlement contract because "a breach of the agreement would be a violation of the order."[23]

Those observations are at the heart of this petition.

III. Disarray among the lower federal courts in applying Kokkonen's dicta, and the crux of this case.

A. Lower court confusion in applying Kokkonen's dicta.

Although Kokkonen cautioned that it is "the holdings of our cases, rather than their dicta" that define ancillary jurisdiction, the opinion's dicta has spawned an explosion of litigation about the existence and extent of district courts' assuming continuing ancillary jurisdiction over settlement of a dismissed case.[24]

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[22] 511 U.S. at 381, 382.

[23] 511 U.S. at 381.

[24] 511 U.S. at 379; *see* 8 James Wm. Moore, Moore's Federal Practice, § 41.34[6][h] (3d ed. 2007) (collecting cases); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2366, at 140-142 (2d ed. Supp. 2007) (collecting cases); M. Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements:* Kokkonen *Revisited*, 2003 Fed. Cts. L. Rev. 2, 7-16 (2003) (discussing applications of *Kokkonen* by various circuit courts); *see also* 50 West's Federal

Professor Resnik posited that the "speculative language" and "tentative and suggestive phrases" in Kokkonen's dicta may mean that the Court "was unprepared to decide definitively how and when ancillary federal jurisdiction was to be available for post-settlement conflict resolution."[25]

Citing a host of inconsistent decisions by the federal courts of appeals, Resnik observed: "Whatever prompted the Court's lack of specificity, as a technical matter, exactly how to establish federal jurisdiction after *Kokkonen* remains unclear."[26] As a result, "many lower court judges disagree about what *Kokkonen* requires."[27]

Professor Jeffrey Parness concurs: "Since *Kokkonen*, the lower federal courts have struggled with requests for the exercise of ancillary settlement enforcement jurisdiction."[28] Kokkonen's dicta has

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Practice Digest 4th *Federal Courts* Key No. 25 (2002 & Supp. 2007); 19A West's Federal Practice Digest 4th *Compromise & Settlement* Key No. 21 (2005 & Supp. 2007).

[25] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 635.

[26] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 635.

[27] Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. at 635.

[28] J. Parness & M. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. 33 (2003).

resulted in "continuing uncertainties and confusion."[29]

Other commentators echo those analyses, observing that Kokkonen's dicta has "created confusion among lower courts," including "inter- and intra- circuit confusion."[30]

Parness identified the major uncertainties:

> Troubling issues include when and how ancillary enforcement jurisdiction should be retained, when such jurisdiction should later be exercised, and what substantive laws and procedures should be employed in settlement enforcement proceedings.
>
> Neither the Supreme Court in its common law decisions or court rules, nor Congress in statutes, has provided significant guidance.[31]

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[29] J. Parness & M. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. at 34.

[30] E. Deason, *Procedural Rules for Complementary Systems of Litigation & Mediation*, 80 Notre Dame L. Rev. 553, 581 n.141 (2005); C. Green, *Justice Scalia and Ancillary Jurisdiction: Teaching a Lame Duck New Tricks*, 81 Va. L. Rev. 1631, 1635 n.16 (1995); *accord* M. Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements:* Kokkonen *Revisited*, 2003 Fed. Cts. L. Rev. 2, 7, 16-17 (2003).

[31] Parness & Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. 33.

He predicted that "[t]roubles will likely continue as civil case settlements are being promoted more than ever."[32]

Parness noted that uncertainties about ancillary jurisdiction over settlement "triggered at times standardless discretionary judicial acts."[33] What happened in this case is one of them.

B. The crux of this action.

In this copyright infringement case, defendant WFMJ Television, Inc. (petitioner here) unilaterally advised the district court that out-of-court settlement talks had yielded an "effective" oral settlement that hadn't been "consummated" yet or put in writing, and suggested that the court not convene a jury for the upcoming trial.[34]

The next day, the court issued an order *sua sponte* dismissing plaintiffs' suit with prejudice and *sua sponte* reserved "continuing jurisdiction" under Kokkonen to resolve disputes in memorializing settlement.[35] The plaintiffs (respondents here) are

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[32] Parness & Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. 33.

[33] J. Parness & D. Sennott, *Expanded Recognition in Written Laws of Ancillary Federal Court Powers*, 64 U. Pitt. L. Rev. 303, 320 (2003).

[34] (App. 45a.)

[35] (App. 48a–49a.)

Catherine Bosley and her husband Richard Brown who claim to own the copyright at issue.

Two weeks later, the parties advised the court that they couldn't conclude a final settlement. Bosley moved to enforce the substance of the pre-dismissal negotiations as comprising the entire contract. WFMJ opposed, saying that those talks hadn't flushed out the substance of the skeletal terms discussed.

About a month later, Bosley's settlement motion remained pending. She filed a notice with the court unconditionally withdrawing the motion.[36] Later that day, she moved the court to vacate the *sua sponte* dismissal order and to set the case for trial.[37] WFMJ didn't oppose. Several days later, the court ordered the parties to appear for an evidentiary hearing on the motion to enforce settlement, which a magistrate judge conducted.

About three months after that, on April 7, 2006, the court granted the plaintiffs' motion to enforce settlement.[38] It did that after effectively converting their unconditional notice of withdrawal into a "motion" to withdraw, which it then denied. It also denied the plaintiffs' unopposed motion to vacate the dismissal order and set the case for trial.

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[36] (App. 54a-55a.)

[37] (App. 60a–63a.)

[38] (App. 23a–44a.)

WFMJ appealed to the United States Court of Appeals for the Sixth Circuit, arguing that the district court didn't have jurisdiction to grant the plaintiffs' settlement motion. The Sixth Circuit panel affirmed the district court, although concluding that "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[39] The court of appeals decided that the parties' litigation at the evidentiary hearing and afterward kept the court's self-invoked jurisdiction over settlement alive.

IV. The Seventh Circuit's contrary view.

The United States Court of Appeals for the Seventh Circuit, principally in opinions by Judge Posner, won't give effect to provisions that retain jurisdiction to resolve future disputes over a privately-negotiated settlement contract when coupled with dismissals with prejudice. Thus:

> An even more serious problem is the conjunction of dismissal with prejudice with retention of jurisdiction to enforce the settlement agreement. ....
>
> [A] district judge cannot dismiss a suit with prejudice, thus terminating federal jurisdiction, yet at the same time retain jurisdiction to enforce the parties' settlement that led to the dismissal with prejudice.

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[39] (App. 6a.)

The Seventh Circuit repeated that view about two weeks after the Sixth Circuit decided this case. The Seventh Circuit said:

> [W]hen a suit is dismissed with prejudice, it is gone, and the district court cannot adjudicate disputes arising out of the settlement that led to the dismissal merely by stating that it is retaining jurisdiction.

Dupuy v. McEwen, 495 F.3d 807, 809 (7th Cir. 2007) (Posner, Easterbrook, Evans, JJ.).[40]

In Dupuy, the Seventh Circuit recognized that other circuits disagree with its view, citing decisions collected in a law review article written by a federal magistrate judge.[41] Unlike the Seventh Circuit, the cases in the other circuits "assume that combining dismissal with prejudice with retention of jurisdiction to enforce the settlement is a permissible method of retaining authority to decide disputes arising from the settlement," as did the Sixth Circuit here.[42]

Federalism underlies much of the Seventh Circuit's disagreement with other circuits and with this Court's

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[40] *Accord Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 489 (7th Cir. 2002) (Posner, Easterbrook, Bauer, JJ.); *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (Posner, Easterbrook, Kanne).

[41] 495 F.3d at 809, citing M. Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 Fed. Cts. L. Rev. 2 (2003).

[42] *Dupuy*, 495 F.3d at 809.

suggestions in Kokkonen. The Seventh Circuit explained:

> The purpose of ancillary jurisdiction of the federal courts ... is to enable a federal court to render a judgment that resolves the entire case before it and to effectuate its judgment once it has been rendered. ...
>
> It is not to enable a federal court to encroach on the jurisdiction reserved to the states merely because the parties would prefer to have a federal court resolve their future disputes ....

Shapo, 463 F.3d at 645.

Indeed, the Seventh Circuit pointed out, the parties could not stipulate validly in a dismissal order that the court would retain jurisdiction if one of them sued their lawyer for malpractice in negotiating the settlement that caused the dismissal. "Parties cannot confer federal jurisdiction by agreement."[43]

The Seventh Circuit distinguishes those bare "retaining jurisdiction" orders from consent decrees that embody the settlement terms, insisting that the two do not have "the same effect" as stated in Kokkonen's dicta.[44]

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[43] *Shapo*, 463 F.3d at 645.

[44] *Kokkonen*, 511 U.S. at 382, see 381.

Because consent decrees are essentially settlement agreements with mandatory judicial commands, the Seventh Circuit recognizes that district courts would have continuing jurisdiction to enforce their terms as they would with any injunction.[45] But dismissing with prejudice and merely retaining jurisdiction over future settlement disputes does not give the court continuing jurisdiction over those future disputes.

V. The crux of what this Court should rule to guide the lower federal courts.

This Court should grant this petition to resolve the continuing confusion among the lower federal courts arising from Kokkonen's dicta. The Court should do that by abandoning the Kokkonen suggestion that would equate the jurisdictional effect of outright dismissals that contain bare recitals of continuing jurisdiction over settlement with the jurisdictional effect of consent decrees that direct the parties to comply.

This Court should rule that merely retaining jurisdiction to resolve disputes over an unseen settlement agreement does not have the same jurisdictional effect as a consent decree embodying the settlement's terms. That distinction, recognized by the Seventh Circuit but ignored by the Sixth and other circuits in relying on Kokkonen's dicta, is pivotal in this case.

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[45] *E.g.*, *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002); *Shapo*, 463 F.3d at 643.

Where a court has concluded the merits of a case by adopting the terms of a settlement and mandating that the parties comply with it, the court has placed its power and prestige behind the contracted settlement terms. If one of the parties breaches those terms, that party has violated the order, as Kokkonen's dicta says, and the court has continuing jurisdiction to enforce that order.[46]

Because the court has ordered the parties to comply with the terms of its consent decree, it must "exercise independent judgment regarding compliance."[47] It "may not blindly defer to the stipulation of the parties" when they ask the court to terminate the decree.[48]

Therefore, when parties to a consent decree advise the court that they no longer seek its enforcement, the matter is not moot. The court has the duty to decide independently whether to continue its jurisdiction to effectuate its own directives.

But merely retaining post-dismissal jurisdiction to resolve disputes over an unseen settlement agreement is different organically. There, the court hasn't directed the parties to do anything. It hasn't ordered them to settle and it hasn't ordered them to comply with any settlement terms. If the parties fail to

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[46] *Kokkonen*, 511 U.S. at 381.

[47] *United States v. State of Michigan*, 18 F.3d 348, 351 (6th Cir. 1994).

[48] *State of Michigan*, 18 F.3d at 352.

consummate a final deal, or later breach a final deal, they haven't violated the court order.

At most, the effect of the court retaining jurisdiction is to enable the parties to move the court to enforce their private settlement contract at their option and without having to file a new lawsuit, a view endorsed by the Seventh Circuit.[49]

As distinct from a consent decree, when a party invokes the bare retention of jurisdiction after a dismissal with prejudice, Article III's mootness doctrine applies when the parties advise the court (separately or together) that they no longer seek enforcement of settlement. At that point, the district court loses whatever jurisdiction it had. It cannot then proceed to order either party to comply with a perceived settlement or to continue to litigate over it.

Moreover, under Kokkonen's holding, rather than its dicta, the parties can't invoke the purportedly retained jurisdiction validly unless their contract dispute presents a federal question or satisfies the requirements for diversity jurisdiction under the federal statutes providing for that jurisdiction.

Adopting that analysis would require this Court to reverse the Sixth Circuit's judgment here, require the district court to vacate it order granting Bosley's motion to enforce settlement, and to establish that the

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[49] *Jessup*, 277 F.3d at 929.

state courts supply the exclusive forum for these nondiverse parties to resolve their settlement dispute.

STATEMENT OF THE CASE

I. The parties and the underlying suit.

Petitioner WFMJ Television, Inc. is a defendant, and owns television station WFMJ in Youngstown, Ohio. Respondents are the two plaintiffs, Catherine Bosley and her husband Richard Brown, who live and work in northeast Ohio.

Bosley sued WFMJ and two of its employees in the federal district court in Cleveland, Ohio, claiming ownership of a copyright in a videotape, and alleging that the employees infringed the copyright by copying the tape.

II. WFMJ's notice of effective settlement.

Jury trial was to begin on November 28, 2005, the Monday after Thanksgiving. On the night before Thanksgiving, while driving home through a blizzard that night, one of WFMJ's lawyers – Stephen Bolton -- had cell phone conversations with one of Bosley's lawyers, Andrew Kabat. They agreed that WFMJ would pay a specified sum of money to settle the case. They later disputed whether they had defined the substance of what WFMJ would receive in exchange for the payment.

Upon learning about the cell phone conversations, another of WFMJ's counsel, David Marburger, understood that the parties had cleared the most

contentious settlement hurdle. Expecting no difficulty in concluding a final, written agreement, realizing that the judge would be preparing for trial during the holiday weekend, and that the court had summoned prospective jurors, Marburger filed a notice of settlement with the court. He filed it electronically on the day after Thanksgiving. In its entirety, the notice said:

> Defendants WFMJ Television, Inc., Michelle Nicks, and John Urchak hereby notify the Court that they have effectively reached a settlement with the plaintiffs.
>
> The documents consummating the settlement are being drafted now. They have not yet been circulated, or (obviously) signed.
>
> Accordingly, there is no need to impanel a jury for trial on Monday, November 28, 2005.

(App. 45a–47a.) The document was titled "Notice of Settlement" and the document identifier at the bottom of the page said "Notice of Tentative Settlement."[50]

Marburger did not advise the court of any settlement term that the lawyers discussed or agreed upon.

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[50] (App. 45a–47a.)

III. *Sua sponte* dismissal with prejudice, reserving continuing jurisdiction over settlement disputes under *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

The next day – the Saturday after Thanksgiving, November 26, 2005 – the court dismissed the suit with prejudice *sua sponte*, adding a *sua sponte* retention of continuing jurisdiction over disputes in memorializing settlement. In its entirety, the court's dismissal order said:

> Upon representation of counsel that the above-captioned case has been settled between the parties, IT IS ORDERED that the docket be marked, settled and dismissed with prejudice.
>
> Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.
>
> FURTHER, the Court retains continuing jurisdiction to resolve disputes concerning the memorialization of this settlement agreement. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

(App. 48a-49a.)

IV. Bosley moves to enforce settlement.

About two weeks later, on December 15, 2005, Bosley moved "to enforce settlement agreement

reached on November 23, 2005."[51] She sought an "order enforcing the settlement" based on counsels' Thanksgiving eve phone calls.

WFMJ opposed the motion the next day, saying that not enough was said on the phone to comprise the full and literal terms of a final agreement.[52] WFMJ said that it was willing to keep negotiating.

V. Bosley unconditionally withdraws her motion to enforce settlement and moves to vacate the dismissal for trial on the merits.

Thirty days after the court had dismissed Bosley's suit with prejudice, WFMJ appealed to the United States Court of Appeals for the Sixth Circuit (No. 06-3091). Ultimately, WFMJ told the Sixth Circuit that there was no final settlement, but that the dismissal with prejudice was the correct judgment because the district court should have granted WFMJ's motion for summary judgment on the merits. Bosley neither appealed nor cross-appealed.

On January 9, 2006, about two weeks after WFMJ appealed and three weeks after Bosley moved to enforce settlement, the district court referred Bosley's motion to a magistrate judge for report and recommendation. After the magistrate judge and the parties had difficulty scheduling an evidentiary

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[51] (Motion, #333.)

[52] (Memor., # 334.)

hearing, Bosley filed a notice unconditionally withdrawing her motion to enforce settlement.[53]

She filed the notice on January 19, 2006. In its entirety, the notice said:

> Plaintiffs, by and through counsel, hereby withdraw their Motion to Enforce Settlement Agreement Reached on November 23, 2005, which was filed on December 15, 2005.

(App. 54a–55a.) Bosley titled the notice: "Plaintiffs' notice of withdrawal of motion to enforce settlement agreement reached on November 23, 2005."[54]

Later on the same day, Bosley moved to vacate the *sua sponte* dismissal with prejudice that had reserved continuing jurisdiction to resolve disputes in memorializing settlement.[55] Saying that she was frustrated with the delay in resolving her settlement motion, Bosley also moved the court to set the case for trial on the merits.

No defendant opposed.

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[53] (App. 54a–56a.)

[54] (App. 54a.)

[55] (App. 60a–63a.)

VI. The district court grants Bosley's (withdrawn) motion to enforce settlement over three months later.

WFMJ contends that when Bosley unconditionally withdrew her settlement motion on January 19, and moved unopposed to vacate the dismissal order and go to trial, the district court lost whatever jurisdiction it had to grant Bosley's motion to enforce settlement.

But after Bosley withdrew her settlement motion, the court ordered the parties to appear for an evidentiary hearing on whether the parties had settled, which resulted in more litigation.

About three months later – on April 7, 2006 – the district court granted Bosley's motion to enforce settlement. The district court did that by, in effect, converting Bosley's unconditional notice withdrawing her settlement motion into a "motion" to withdraw the settlement motion. The court then treated Bosley as moving separately, but simultaneously, for an order to grant her settlement motion and for an order allowing her to withdraw the settlement motion. The court denied her "motion" to withdraw the settlement motion and granted the settlement motion.[56]

The district court also denied Bosley's unopposed motion to vacate the dismissal order that had retained jurisdiction over settlement.[57]

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[56] (App. 23a–44a.)

[57] (App. 23a–44a.)

VII. The court of appeals affirms.

WFMJ appealed the district court's granting of Bosley's motion to enforce settlement, principally arguing that her unconditional withdrawal of the motion rendered the matter moot, depriving the court of Article III jurisdiction to grant it and ended whatever jurisdiction Kokkonen could have authorized the court to reserve. WFMJ added that Kokkonen's dicta did not and could not allow the district court's self-authorized continuing jurisdiction to enforce settlement after Bosley had abandoned her motion, sought a trial on the merits, and WFMJ had advised the court that it saw no final settlement to enforce.

Bosley's merits brief to the Sixth Circuit acknowledged that her motion to enforce settlement "had been withdrawn."[58] The court of appeals concluded that "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[59]

But the court of appeals nevertheless concluded that the settlement matter was "not moot" principally because the parties continued "vigorous" litigation over the settlement issue afterward.[60] Finding that the evidence adduced in the evidentiary hearing conducted

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[58] (Appellee brief in 6th Cir. at 34.)

[59] (App. 6a.)

[60] (App. 6a.)

after Bosley had withdrawn her settlement motion was enough to form a contract, the Sixth Circuit affirmed.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to resolve the continuing confusion among the lower federal courts arising from Kokkonen's dicta, as explained in the preliminary statement, and because the court of appeals erred as a matter of law in finding federal jurisdiction to enforce settlement when there wasn't any.

I. The Sixth Circuit's opinion is inconsistent with Article III's mootness doctrine.

When the district court dismissed this copyright case with prejudice *sua sponte*, and *sua sponte* retained continuing jurisdiction to resolve disputes concerning the memorialization" of settlement,[61] the court knew nothing of any actual or potential settlement term, and did not order the parties to settle or abide by any agreement.

The court of appeals recognized that, nearly two months later, on January 19, 2006, Bosley filed a notice withdrawing her post-dismissal motion to enforce settlement.[62] The court of appeals concluded that "there can be no doubt that the document filed

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[61] (App. 48a–49a.)

[62] (App. 54a–55a.)

with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[63]

Despite that conclusion, the Sixth Circuit decided that the Article III controversy was "not moot" principally because the parties continued "vigorous" litigation over the settlement issue afterward.[64]

That conclusion would be correct if the district court had continuing jurisdiction under a consent decree. But after Bosley withdrew her settlement motion, the district court could not rest its continuing jurisdiction on any need to vindicate or effectuate the dismissal of the merits, a ground unanimously rejected in Kokkonen's holding.[65] And there was no order that the district court needed to enforce. The district court did not direct the parties to settle or to abide by any agreement. If both parties had walked away from settlement, simply deciding to quit, they would have violated no court order.

Just three days before the Sixth Circuit opinion here, a different panel adopted an analysis much like WFMJ's. The panel wrote that "where, as here, the district court affirmatively opts to maintain jurisdiction even after the filing of the notice of appeal for the purpose of resolving still-pending motions, its

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[63] (App. 6a.)

[64] (App. 6a.)

[65] 511 U.S. at 380-381.

jurisdiction expires following the resolution of the last motion."[66]

The Federal Circuit ruled similarly in a similar circumstance in Earth Island Institute v. Albright.[67] There, the district court gave the defendant United States a deadline to issue revised regulations in response to Earth Island's challenge of existing ones. After the deadline, Earth Island filed a motion "to enforce the court's judgment," alleging that the government had failed to comply with the court's order.

After oral argument on the motion to enforce, Earth Island filed a letter with the court, saying "plaintiffs hereby withdraw their motion to enforce the judgment."[68]

The district court, however, elected to treat Earth Island's letter as a "petition to withdraw" its motion to enforce. It then denied that petition, and granted the motion to enforce.[69] The Federal Circuit reversed, ruling that the district court had no Article III jurisdiction to grant Earth Island's motion to enforce. The Federal Circuit concluded:

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[66] *Dixon v. Clem*, 2007 WL 1975981 at *13 (6th Cir., July 10, 2007).

[67] 147 F.3d 1352 (Fed. Cir. 1998).

[68] 147 F.3d at 1355.

[69] 147 F.3d at 1355.

> When Earth Island expressly withdrew its motion, nothing remained for the trial court to resolve. ...
>
> The controversy between the parties ceased when Earth Island withdrew its motion.

147 F.3d at 1356.

But, the Sixth Circuit tried to distinguish Earth Island by saying that the parties there stopped litigating after Earth Island withdrew its motion to enforce, but that the parties here continued to litigate after Bosley withdrew her motion to enforce.

The Sixth Circuit's attempted distinction is invalid. The "presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself" to sustain federal jurisdiction.[70] Even where all parties "vehemently deny" that a case is moot, their insistence upon litigating can't keep a moot case alive.[71] Although there's "no want of an adversary contest," the court can't proceed to rule after a mooting event.[72]

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[70] *Diamond v. Charles*, 476 U.S. 54, 62 (1986).

[71] *Nat'l Labor Rltns Bd. v. Globe Security Srvcs, Inc.*, 548 F.2d 1115, 1117 (3d Cir. 1977).

[72] *DeFunis v. Odegaard*, 416 U.S. 312, 315, 320 (1974) and 349 (Brennan, J., joined by Douglas, White, and Marshall, JJ., dissenting); *Kremens v. Bartley*, 431 U.S. 119, 127, 134 (1997).

Litigants cannot "by stipulation" overcome the mootness doctrine.[73]

Thus, what matters isn't whether the parties continue to vigorously disagree, or continue to file motions, or even if the trial court continues to rule. What matters is whether the controversy remains *justiciable* – whether Article III and other sources of federal subject-matter jurisdiction *empower* the judge to rule.

Here, neither Bosley nor the court of appeals or district court cited any authority beyond Kokkonen's dicta that Article III empowered the district court to grant Bosley's settlement motion after she withdrew it. Even a consent decree, which would afford more expanded jurisdiction than the bare retention of jurisdiction at issue here, can't "suspend the application of Article III."[74]

II. The Sixth Circuit and the district court failed to identify a valid ground for the district court to dismiss the case with prejudice and to invoke jurisdiction to resolve settlement disputes when no party asked for either.

Neither Kokkonen nor the federal rules empower the district court to dismiss a case with prejudice *sua*

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[73] *Sosna v. Iowa*, 419 U.S. 393, 398 (1975); *California v. San Pablo & Tulare RR Co.*, 149 U.S. 308, 314 (1893).

[74] *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999).

sponte while *sua sponte* retaining "continuing jurisdiction" to resolve future settlement disputes.

Kokkonen said: "If the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement agreement," they have two options under two different Rule 41 dismissal scenarios.[75] Kokkonen offered no other options, and said that the failure to satisfy either option means that nondiverse parties have no ground for disputing settlement contracts in federal court.[76]

Under the first option, if plaintiff seeks dismissal after the defendant has answered the complaint or moved for summary judgment, the court could condition the dismissal on the court retaining jurisdiction over settlement or incorporating the terms in the dismissal order. The court can do that because Civil Rule 41(a)(2) empowers it to add "terms and conditions as the court deems proper."[77]

In the second option, the parties could stipulate to a dismissal in which the court has jurisdiction over settlement disputes, but only "if the parties agree."[78] The Court relied on Rule 41(a)(1)(ii), which allows the parties to stipulate to voluntary dismissals.

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[75] *Kokkonen*, 511 U.S. at 381-82 (emphasis in original).

[76] 511 U.S. at 382.

[77] *Kokkonen*, 511 U.S. at 381.

[78] *Kokkonen*, 511 U.S. at 381-82.

But that rule does not authorize district courts to impose its own conditions *sua sponte* on the parties' stipulation.[79]

Here, neither Bosley nor WFMJ sought a dismissal with prejudice or the court's retention of jurisdiction over future settlement disputes.

Because the district court based its dismissal with prejudice on WFMJ's unilateral notice of an effective agreement with Bosley to settle, the court's dismissal most closely resembles a dismissal by stipulation under Rule 41(a)(1)(ii). It is not like a post-answer dismissal in which the court can impose conditions on a plaintiff's unilateral request to dismiss -- Rule 41(a)(2). That's because the plaintiff here – Bosley – made no such request.

By *sua sponte* reserving to itself jurisdiction to resolve disputes over a not-yet consummated settlement, the district court altered a fundamental component of whatever private consensus the parties had reached. The parties had not negotiated that the district judge would be the final arbiter of their future settlement disputes. WFMJ did not agree with Bosley to surrender any right to seek redress from an Ohio court if future contract disputes developed. So, the district court's self-invoked "continuing jurisdiction" over settlement effectively grafted a forum-selection

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[79] *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998); 8 Moore, Moore's Federal Practice, § 41.34[3] (3d ed. 2007). *Compare* Rule 41(a)(1), *with* Rule 41(a)(2).

clause onto the parties' alleged agreement, potentially excluding relief from state court.

District courts are not empowered to alter perceived private settlement agreements by interjecting terms "that the parties neither anticipated nor negotiated," much less adopting them in an order.[80]

The district court's bold exercises of judicial power here *sua sponte* exemplify the kind of "standardless discretionary judicial acts" spawned by Kokkonen's dicta.[81]

III. Because WFMJ has paid the full amount of the settlement to Bosley only to comply with the judgment of the court of appeal, this petition is not moot.

After the Sixth Circuit issued its opinion and judgment affirming the district court's granting of Bosley's motion to enforce settlement, WFMJ paid the full settlement amount in compliance with both courts' judgments.

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[80] *Gardiner v. A.H. Robbins Co.*, 747 F.2d 1180, 1189-90 (8th Cir. 1984).

[81] *See* Parness & Sennott, 64 U. Pitt. L. Rev. at 320.

But it is hornbook federal law that a losing party's compliance with a judgment does not, by itself, bar further appeal.[82]

Although compliance could moot an appeal in certain instances (*e.g.*, where compliance cannot be undone), the "easiest cases" to determine whether an appeal is moot "involve[ ] the payment of a money judgment pending appeal."[83] Those cases are not moot because the judgment debtor can seek repayment if the judgment is reversed or vacated.[84]

Well over a century ago, this Court established:

> There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring

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[82] *Mancusi v. Stubbs*, 408 U.S. 204, 205-07 (1972) (obeying circuit court's judgment by re-sentencing defendant did not moot State of New York's appeal); *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437, 442 (1948) (obeying district court's injunction by lifting boycott did not moot union's appeal).

[83] 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.2, at 248 (2d ed. 1984).

[84] *E.g.*, *Dale M. v. Bd. of Educ. of Bradley-Bourbonnais High School Dist. No. 307*, 237 F.3d 813, 815 (7th Cir. 2001) (Posner, J.); *United States ex rel. Morgan & Son Earth Moving, Inc. v. Timberland Paving & Construction Co.*, 745 F.2d 595, 598 (9th Cir. 1984); *see also* Restatement (First) of Restitution § 74 (observing that "a person who has conferred a benefit upon another in compliance with a judgment . . . is entitled to rescission if the judgment is reversed or set aside").

> a writ of error to reverse it, and if reversed can recover back his money.

Dakota County v. Glidden, 113 U.S. 222, 224 (1885).

Even the party accepting the payment of the amount of a judgment does not lose the right to challenge the judgment solely because of that acceptance.[85]

Thus, a party who does not get a stay of the circuit court's mandate can still appeal to this Court.[86]

Here, WFMJ did not seek a stay of the mandate. Instead, it paid Bosley in obedience to the Sixth Circuit's judgment, which affirmed the district court's order granting Bosley's motion to enforce the disputed settlement. WFMJ told Bosley that it would pay the money in compliance with the judgment. WFMJ said:

> Unconditional offer to pay
>
> The court of appeals' opinion is to affirm the district court's order granting Ms. Bosley's motion to enforce settlement and we anticipate the court of appeals to issue a mandate consistent with that opinion.

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[85] *U.S. v. Hougham*, 364 U.S. 310, 312 (1960).

[86] *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947); *Carr v. Zaja*, 283 U.S. 52 (1931) (Holmes, J.).

> In obedience to the court of appeals' opinion and anticipated mandate, we offer to pay the entire settlement amount plus post-judgment interest (which this letter describes in more detail later).

(App. 65a.) The letter closed: "This offer is not contingent upon your clients or their counsel signing any legal instrument or agreeing to anything except what we would need to document and facilitate payment."[87]

WFMJ termed this an "unconditional offer to pay" because Bosley did not have to exchange anything or surrender any right to receive payment. Therefore, it was not a settlement; it was nothing more than obedience to the circuit court's judgment.

WFMJ did not suggest that it was relinquishing its rights to seek certiorari, nor did it offer to do so. Because WFMJ paid in obedience to the circuit court's judgment, WFMJ has a right to seek restitution from Bosley if this Court causes the district court to vacate its settlement order. Thus, this petition cannot be moot.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

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[87] (App. 70a.)

Respectfully submitted,

David L. Marburger
Counsel of Record
Matthew J. Cavanagh
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114
(216) 621-0200

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 06-3091, 06-3624, 06-3625, 06-3626, 06-3894, 06-3895

[Filed July 13, 2007]

CATHERINE BOSLEY, also known as Catherine Balsley, and RICHARD BROWN,	)
Plaintiffs-Appellees,	)
v.	)
21 WFMJ TELEVISION, INC., MICHELLE NICKS, and JOHN URCHEK,	)
Defendants-Appellants.	)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: GIBBONS and COOK, Circuit Judges; CLELAND, District Judge.*

JULIA SMITH GIBBONS, Circuit Judge. Plaintiffs-appellees Catherine Bosley and Richard Brown (collectively "plaintiffs") brought the instant action raising a copyright infringement claim and a number of other state law claims. Defendants-appellants 21 WFMJ Television, Inc. ("21 WFMJ"), Michelle Nicks, and John Urchak (collectively "defendants") challenge orders of the district court: (1) denying defendants' motions for summary judgment as to plaintiffs' claims and granting plaintiffs' motion for summary judgment as to defendants' counterclaim; (2) granting plaintiffs' motion to enforce an oral settlement agreement; and (3) denying Nicks's and 21 WFMJ's two joint motions requesting that the district court judge recuse himself.

For the reasons that follow, we (1) affirm the district court's order enforcing the parties' oral settlement agreement in accordance with the terms specified in that order; (2) affirm the district court's denial of the motions for recusal; and (3) dismiss the remainder of the appeal as moot.

I.

The events giving rise to the instant suit involve the copying and distribution of a video in which Bosley was depicted in a state of undress while participating

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* The Honorable Robert H. Cleland, United States District Judge for the Eastern District of Michigan, sitting by designation.

in a wet T-shirt contest at a bar in Key West, Florida. The proceedings in the district court have been extensive and rancorous, and while the parties vigorously dispute the merits of their claims, the underlying facts relevant to these merits issues are, for the most part, unnecessary to the disposition of this appeal. We instead must focus our attention on the proceedings below and the facts related to the parties' settlement negotiations as our ultimate finding that the parties did reach a full settlement of all claims obviates any need to resolve the parties' dispute over the merits of their claims.

Plaintiffs filed suit against defendants on December 23, 2004. Following the parties' motions for summary judgment, the district court denied summary judgment on plaintiffs' claims as to both parties and granted summary judgment to plaintiffs on defendants' counterclaim. On November 25, 2005, several days before trial was scheduled to begin, defendants notified the district court that the parties had effectively settled their dispute and advised the court that there was no need to impanel a jury. Following defendants' notice, the district court, *sua sponte*, dismissed the case with prejudice, retaining jurisdiction over any settlement disputes or disputes involving the parties' memorialization of the settlement terms. Defendants filed a timely notice of appeal as to this dismissal in which they challenge the district court's rulings on the parties' motions for summary judgment.

In the interim, the parties attempted to finalize their settlement agreement, but a dispute arose as to its terms. On January 9, 2006, plaintiffs filed a motion seeking enforcement of the parties' settlement

agreement and alleging that defendants were attempting to modify the terms of settlement and add additional terms to which the parties had never agreed. The district court referred that motion to a magistrate judge, and the magistrate judge conducted an evidentiary hearing on January 30, 2006. In his report and recommendation, the magistrate judge recommended that the district court find that the parties settled their dispute according to the terms outlined therein and grant plaintiffs' motion. The district court adopted the report and recommendation in full. The district court also denied two joint motions filed by Nicks and 21 WFMJ seeking recusal of the district court, one of which was filed before the district court adopted the report and recommendation and one of which was filed after. Defendants filed timely notices of appeal as to each of these rulings.

II.

As a threshold matter, we must address defendants' challenge to the propriety of the district court's exercise of jurisdiction over the plaintiffs' motion to enforce settlement. Relying upon the reasoning of *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998), defendants contend that plaintiffs unconditionally withdrew their motion to enforce the oral settlement agreement, rendering their motion moot and depriving the district court of subject matter jurisdiction. Accordingly, defendants argue, we should vacate the district court's order granting plaintiffs' motion. In *Earth Island*, the Federal Circuit held that a movant's unconditional withdrawal of its pending motion deprives the district court of subject matter jurisdiction over that motion and prevents the district

court from rendering a decision on the merits. 147 F.3d 1356-57.

Defendants' mootness argument has its genesis in three documents plaintiffs filed with the district court between January 19 and 20, 2006. On January 19, plaintiffs filed two items: (1) a notice that plaintiffs intended to withdraw their motion requesting that the district court enforce the parties' oral settlement agreement and (2) a motion requesting that the district court set aside its judgment of dismissal and set a new date for trial. The docket entry for the former filing identifies it as having been "FILED IN ERROR." The docket entry also states that the plaintiffs will refile the document as a motion. On January 20, plaintiffs filed a document identical in all respects to the original notice of withdrawal except that it is captioned on the docket sheet as a motion.

On different facts, defendants' argument would be more compelling. However, the case before us is distinguishable from *Earth Island*, and that decision has no bearing on our decision today. In that case, after the plaintiff sent a letter to the court explaining its intent to withdraw the motion for summary judgment, the district court ignored the unequivocal language contained in the correspondence and recharacterized the filing as a petition for leave to withdraw, which it in turn denied. *Earth Island*, 147 F.3d at 1356. Furthermore, following Earth Island's letter, no further action was taken by either party, and eighteen days later, the district court simply issued an opinion granting Earth Island's original motion. *Id.*

While there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion, the similarity between this case and *Earth Island* ends there. First of all, the first of the two documents is listed as erroneously filed, and the second is captioned as a motion. Of course, errors in docketing are not unheard of, but it is telling that neither the parties nor the court treated this second filing as a withdrawal of plaintiffs' pending motion. The voluminous filings and rather vigorous disagreement between the parties over whether and under what terms the parties had settled confirm that the controversy was not moot. In fact, when pressed on this point at oral argument, defendants' counsel effectively conceded that whatever plaintiffs' position may have been at the time the motions were filed, the frustration they felt in attempting to enforce settlement that prompted their efforts to withdraw their motion had been alleviated, and plaintiffs were prepared to litigate the dispute over settlement. Quite simply, the fifteen months of continued litigation belies any claim by defendants that the settlement dispute was no longer live. We therefore see no error in the district court's exercise of jurisdiction over plaintiffs' motion.

III.

We now turn to the defendants' claim that the district court erred in granting plaintiffs' motion to enforce settlement.

A.

In reviewing a district court's decision to grant a party's motion to enforce an oral settlement agreement, this court reviews the district court's factual determination that the parties have agreed to settlement and of the terms of settlement for clear error. *Re/Max Int'l, Inc. v. Realty One. Inc.*, 271 F.3d 633, 645 (6th Cir. 2001). We review a district court's decision to enforce that agreement based on these preliminary factual findings for an abuse of discretion. *Id.*; *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 418 (6th Cir. 2000). The fact that the parties have yet to reduce their agreement to writing is no bar to enforcement: "[w]hen parties have agreed on the essential terms of a settlement, and all that remains is to memorialize the agreement in writing, the parties are bound by the terms of the oral agreement." *ReMax*, 271 F.3d at 646 (citing cases).

An abuse of discretion exists when the reviewing court is "left with the definite and firm conviction that the [district] court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where it improperly applies the law or uses an erroneous legal standard." *Id.* at 645 (internal quotation marks omitted). A factual finding is clearly erroneous "where although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 825 (6th Cir. 2007) (internal quotation marks omitted).

B.

Plaintiffs first argue that defendants have waived their right to appeal the district court's adoption of the magistrate judge's report and recommendation because of their failure to object in a timely fashion. In *United States v. Walters*, this court held that a party's failure to object to a magistrate judge's report within the time provided for filing objections operates as a waiver of that party's right to appeal. 638 F.2d 947, 949-50 (6th Cir. 1981); *see also Thomas v. Arn,* 474 U.S. 140, 142 (1985) (approving *Walters* rule). However, this rule is procedural and not jurisdictional, and the court may excuse compliance with it in the interests of justice. *See Thomas*, 474 U.S. at 155.

Defendants concede the untimeliness of their objections, but they urge us to follow the rule adopted in *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983). *Patterson* provides, in relevant part, "when written objections to a magistrate's report are tendered beyond the 10 day period . . . , but are nevertheless filed and considered by the district court, the criteria identified in *Walters* in justification of the waiver rule . . . dissipate[,] and the rule will not apply to bar appellate review." 717 F.2d at 286; *see also O'Neal v. Morris*, 3 F.3d 143, 144-45 (6th Cir. 1993), *vacated on other grounds sub nom.*, *O'Neal v. McAninch*, 513 U.S. 432 (1995).

The district court did not specifically address the merits of each objection raised by the defendants and expressly refused to allow the defendants to file untimely objections, granting plaintiffs' motion to strike the objections as untimely filed. Thus, there is

an argument that *Patterson* is not controlling in this case. However, a review of the district court's order reveals that the court did address defendants' principal objections to the report and recommendation even though it was under no obligation to do so. As a matter of substance, if not form, the district court elected to address defendants' objections. Accordingly, we do not believe that the record before us justifies application of the *Walters* rule and will therefore address the merits of defendants' appeal.

C.

The record before us provides ample evidentiary support for the district court's factual findings regarding the terms of and the parties' entry into a settlement agreement. Moreover, defendants have provided no evidence that would call the district court's findings into question. Therefore, as explained below, we find no error in the district court's decision to grant plaintiffs' motion to enforce settlement.

As an initial matter, defendants argue that the district court erred in its overall finding that the parties reached agreement as to the essential terms of settlement. Defendants characterize the conversations between Andrew Kabat, counsel for plaintiffs, and Stephen Bolton, counsel for defendants — found by the district court to have established the essential terms of the agreement — were little more than preliminary negotiations. Defendants further assert that it was improper and inequitable for the district court to hold the parties to obligations allegedly incurred during these negotiations, the product of which was an incomplete contract. Defendants do not identify,

however, what elements were missing from the agreement at the time they notified the district court that there was no need to impanel a jury because the case had been settled. Defendants seem to assume that because they would have preferred that the agreement contain terms different from those agreed upon by Bolton and Kabat, the agreement must necessarily be incomplete, and as a consequence, there was no meeting of the minds. Just as the district court observed, however, the objective acts of the parties do not support defendants' position. *See Re/Max*, 271 F.3d at 646 (noting that even though the parties had not yet formalized their agreement in writing, their "objective acts . . . reflect[ed] that an agreement had been reached").

Days before trial, defendants filed a "Notice of Settlement," notifying the court that there was no need to impanel a jury because the parties had "effectively reached a settlement." This notice did not state that the parties were *close* to settlement or that talks were *on the verge* of producing an agreement. Rather, the defendants themselves stated that agreement had effectively been reached and that the process of drafting documents had begun. Moreover, the notice contained no hint that settlement was contingent on the negotiation of additional terms or, as defendants' counsel asserted at oral argument, the actual memorialization of the agreement terms in a written document. Defendants make much of their use of the word *effective* in the notice filed with the district court. While this may communicate some degree of equivocation, it provides little support for defendants' claim that settlement was somehow contingent on the negotiation of additional material terms. In addition,

neither party objected when the district court, upon receipt of defendants' notice, dismissed the case with prejudice, retaining jurisdiction only to resolve any disputes over settlement terms. A settlement agreement, like any other contractual arrangement, depends upon objective, not subjective, manifestation of intent. *See Therma-Scan, Inc.*, 217 F.3d at 420 (citing *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1258 (5th Cir. 1990)). By all appearances, the parties operated as if their dispute had been resolved. Defendants point to nothing in the record — beyond their own undisclosed subjective intent — that would call the district court's finding of an agreement into question, much less support a finding of clear error.

The district court found that the parties agreed to the following terms: (1) payment of a specified amount by defendants to plaintiffs; (2) confidentiality as to that amount; (3) mutual release of all claims against all parties; (4) plaintiffs' release of all parties named in their complaint, including those not specifically identified; and (5) language in the judgment of settlement indicating that costs of the litigation would be paid by the plaintiffs.

In the report and recommendation adopted by the district court, the magistrate judge conducted a thorough examination of the evidentiary record compiled by the parties. The magistrate judge laboriously documented the evidentiary support for each term identified above, noting that each was corroborated in the testimony of both Kabat and Bolton.

With respect to the confidentiality term of the settlement, defendants argue that the district court clearly erred in finding that the confidentiality provision was limited to the sum to be paid plaintiffs by defendants. Defendants direct our attention to portions of Bolton's testimony suggesting that he and Kabat never discussed confidentiality except insofar as it related to the amount of the settlement and that the defendants never intended to limit the confidentiality provision only to the amount of settlement. Of course, as the magistrate judge observed, Kabat testified that he explained to Bolton that plaintiffs were willing to agree to confidentiality only as to the *settlement amount*. Bolton further testified that he understood Kabat's position and that he acquiesced to it. Defendants argue that Bolton never intended to limit the confidentiality provision in this manner and that he simply expected to work out the rest of the details as a later date; however, as Bolton acknowledged, he never made Kabat aware of his intentions during their conversations.

As to the mutual release, defendants argue that they never intended to release their counterclaims against Bosley. According to defendants, because Kabat and Bolton never discussed the specific claims that would be affected by the parties' mutual releases, it was error for the district court to hold that the parties effected a mutual release of all claims by all parties. Bolton acknowledged in his testimony that, though not his intent at the time, a "reasonable" interpretation of a "mutual release" term includes a release of all claims by all parties, including counterclaims by a defendant.

At its core, defendants' argument as to both of these matters rests on a single assumption: because the district court's factual findings conflict with Bolton's undisclosed and subjective understanding of the terms of the agreement negotiated with Kabat, the district court clearly erred. Thus, under the approach advocated by defendants, the district court erred not because the terms of the agreement found by the court lack evidentiary support but rather because the district court did not view the evidence through the lens of defendants' counsel.

Defendants' position is untenable. The fact that the defendants are now unhappy with the bargain they made is insufficient to support a finding of clear error. There is nothing in the evidentiary record that would suggest that Bolton's position on these issues was communicated to Kabat during the settlement negotiations, constructively or otherwise. Defendants' efforts to avoid their bargain on the theory that Kabat's failure to delve into Bolton's internal state of mind excuses their performance are unavailing. The district court did not err in its findings regarding the terms of the parties' agreement.

Finally, defendants argue that the district court erred in enforcing the settlement agreement because Kabat failed to disclose Bosley's intentions to publish the fact of the settlement in a television appearance. According to the defendants, Kabat's failure to disclose Bosley's intention to appear on the Oprah Winfiey Show and make statements about the settlement of her case even though Kabat knew of the defendants' desire for confidentiality constituted fraud. Defendants' argument is meritless. As noted above,

Kabat made clear to Bolton that plaintiffs were willing to keep *only* the *amount* of the settlement confidential. Bolton did not pursue the matter further, and the mere fact that Kabat did not disclose Bosley's plans to publicize the settlement is immaterial. Defendants were well aware of the plaintiffs' position on confidentiality. They had every opportunity to negotiate a broader confidentiality provision yet elected not to do so. The mere fact that defendants would have preferred to know about Bosley's intentions hardly suffices to establish that Kabat had a duty to disclose this information, much less suffices to make out a claim of fraud.

Upon review of the entire record, there can be little doubt that the district court correctly found the existence of an enforceable settlement agreement. The district court also committed no error in resolving the parties' dispute over the terms of that agreement. On this record and in the absence of any showing by the defendants that the district court committed error, we see no abuse of discretion in the district court's decision to enforce the parties' agreement.

IV.

We next address the claim by Nicks and 2 1 WFMJ that the district court cned in denying their two joint motions for recusal.

A.

This court reviews a district court's denial of a motion to recuse for an abuse of discretion. *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251 (6th Cir. 1989);

see also Bell v. Johnson, 404 F.3d 997, 1004 (6th Cir. 2005). The Wheeler court observed,

> The law with regard to recusal under section 455 is straightforward and well-established in the Sixth Circuit. A district judge is required to recuse himself only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. This standard is objective and is not based on the subjective view of a party.

Id. (internal citations and quotation marks omitted). Moreover, "[i]n order to justify recusal under 28 U.S.C. § 455, the judge's prejudice or bias must be personal or extrajudicial. Personal bias is prejudice that emanates from some source other than participation in the proceedings or prior contact with related cases." *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005) (internal citation and quotations marks omitted); *see also Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003). However, even bias that is not "extrajudicial" may be so "extreme as to display clear inability to render fair judgment," requiring recusal of a judicial officer. *Liteky v. United States*, 510 U.S. 540, 551 (1994).

B.

Defendants first argue that the district court should have recused itself because of its prior involvement in

a related case, *Bosley v. Wildwett. com.*[1] According to the defendants, Judge Gwin was responsible for helping facilitate the agreement that resulted in the settlement of that case. As part of that settlement and in exchange for a reduced cash payment, Bosley received any copyright in the video that gave rise to this litigation held by DreamGirls, Inc. — one of the defendants[2]. Defendants further contend that it was Judge Gwin who first suggested the possibility of this transfer to the parties. Because Judge Gwin was involved in the prior settlement, defendants argue, he has an "implied commitment to vindicat[e] Bosley's exploitation of the purported copyright in this case." Moreover, according to defendants, "[t]hat implied stake ranges from sustaining Bosley's ability to sue on the copyright, to ensuring a favorable climate for settlement, making up for the cash shortfall [resulting from the prior settlement]."

The record provides no basis for defendants' claim of bias. Other than their own speculation, defendants

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[1] In addition to its ruling on the merits, the district court determined that the defendants failed to file their second motion within a reasonable time after they learned of the grounds for recusal. Judge Gwin's observations about defendants' delay in bringing this ground for recusal to the court's attention only bolster his decision not to grant defendants' second motion. Defendants dispute the point at which they became aware of Judge Gwin's involvement in the prior action. However, because defendants' argument on appeal as to the merits is not well taken, there is no need to resolve the matter.

[2] It is this copyright that Bosley sought to vindicate in the instant suit.

offer no support for their claim that Judge Gwin had such an implied obligation. They point to nothing in the record that would suggest Judge Gwin had somehow become invested in Bosley's lawsuit against them. In the absence of any evidence to suggest that Judge Gwin was incapable of impartially adjudicating the case before him, the mere fact that the defendants believe that Judge Gwin has some interest in seeing Bosley's action succeed does nothing to advance their argument that Judge Gwin erred in refusing to recuse himself.

As before the district court, defendants have identified only two cases that involve a factual scenario that is even remotely similar to the one before us. In each case, the district court *voluntarily* recused itself after determining that its prior involvement with settlement negotiations warranted exercising caution. *Black v. Kendig,* 227 F. Supp. 2d 153, 155-56 (D.D.C. 2002) (magistrate judge recused himself from dispute over terms of settlement where he had supervised settlement negotiations); *Day v. NLO,* 864 F. Supp. 40, 43 (S.D. Ohio 1994) (disagreeing with the idea that a "trial judge who has participated in settlement negotiations is necessarily incapable of reviewing that settlement" but recusing himself fiom Rule 23(e) fairness proceeding "out of an abundance of caution"). These cases, while in some ways similar, implicate somewhat different concerns. In each case, the judges' decisions to recuse were motived by concern over their ability to remain impartial in reviewing settlements in which they played a part in crafting. Whatever this authority may have to say about situations where voluntary recusal would be prudent, it offers little guidance as to the propriety of Judge Gwin's decision

not to recuse in this particular case. Offering little more than conjecture, defendants conclude that no reasonable person could but doubt Judge Gwin's impartiality. Neither case law[3] nor common sense supports defendants' position, and Judge Gwin did not abuse his discretion in declining to recuse.

Defendants offer a second and independent ground in support of their claim that the district court should have recused. They claim that certain comments made by Magistrate Judge Limbert prior to the evidentiary hearing on plaintiffs' motion to enforce settlement demonstrated that the district court was incapable of rendering an impartial decision. According to defendants' declarations filed with the district court, Judge Limbert disclosed to the parties that Judge Gwin had instructed him to find that the parties had agreed to settle their dispute under certain terms and that the evidentiary hearing requested by defendants would be of little consequence. Moreover, defendants stated that Judge Limbert informed them that Judge

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[3] In their briefing, defendants also draw on general principles of fairness that demand a judge be recused where he or she is called upon to review independently his or her own judicial rulings. They argue that this principal applies with equal force to the facts of this case. The cases cited by defendants have no bearing on this case. Judge Gwin made no determination in the prior lawsuit as to the validity of any copyright held by Bosley; he simply helped to mediate and approved of a settlement whereby one of the defendants in Bosley's first lawsuit "agreed to assign to [her] whatever copyright it had, without warranty, in video of Bosley." Thus, defendants' contention that the instant suit required Judge Gwin to review the propriety of his prior ruling is incorrect, and the cases upon which they rely in this regard are inapposite.

Gwin would not set the matter for trial or otherwise disturb his prior dismissal order because he had determined that the parties' dispute was settled.

The crux of defendants' argument is that these statements demonstrate that Judge Gwin held such deep-seated predisposition as to the proper outcome of the parties' dispute as to render impossible any fair judgment. *See, e.g., Liteky*, 510 U.S. at 551; *United States v. Howard*, 218 F.3d 556, 566 (6th Cir. 2000) ("A predisposition acquired by a judge during the course of the proceedings will only constitute impermissible bias when 'it is so extreme as to display clear inability to render fair judgment.'") (quoting *id.*). Were the facts of this particular case confined to those outlined in defendants' declarations, their argument might have more traction.

However, given defendants' allegations that Judge Limbert's comments called into question the possibility of a fair resolution of the settlement issue, it is perplexing that they waited nearly six weeks before first drawing the court's attention to Judge Limbert's statements and almost two months before filing their recusal motion[4]. Defendants claim that, following Judge Limbert's disclosure, they had every reason to believe that the outcome of plaintiffs' motion to enforce

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[4] According to defendants, Judge Limbert conveyed this information on January 30, 2006. The first reference to Judge Limbert's alleged revelation appears in defendants' declarations filed in support of a motion to supplement the record filed on March 13, 2006, and their motion for recusal was not filed until March 27, 2006.

settlement was predetermined and that they could not possibly receive a fair hearing. Although defendants claim that by all appearances, the result was foreordained, their concerns did not motivate them to question the impartiality of the court for nearly two months — almost one month after Judge Limbert issued his report and recommendation. While not dispositive, the delay in filing undercuts defendants' claims significantly. *See In re City of Detroit*, 828 F.2d 1160, 1167-68 (6th Cir. 1987) ("Timeliness is a factor that obviously merits consideration by a court that is trying to determine whether ajudge is truly biased or a litigant is merely trying to avoid an . . . adverse decision."), *overruled in part on other grounds by In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136, 1140-43 (6th Cir. 1990) (en banc).

Moreover, in his order denying defendants' recusal motion, Judge Gwin stated that he never instructed Judge Limbert to come to any specific resolution of the case. To the contrary, Judge Gwin stated,

> [i]n referring the matter, the Court did not direct Magistrate Limbert to reach any particular decision. This Court has no authority to tell any judicial officer to make any decision. Having read the parties submissions before referring the motion, the Court no doubt indicated [what was] apparent — Defendants had an obviously weak argument. Repeating, at the time of the referral, Defendant's only argument recognized the parties had reached settlement on major terms but claimed it could avoid settlement over some undiscussed and unreserved term.

In addition, as Judge Gwin observed, the Supreme Court has recognized that judges may properly form opinions "on the basis of facts introduced or events occurring in the course of the current proceedings . . . unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.[5]

Also undercutting defendants' claim of judicial bias is the thoughtful and thorough analysis that has been conducted at each stage of this litigation. The magistrate judge thoroughly analyzed the factual record before him and found corroboration for his ruling in the testimony of counsel for both parties. The district court, though under no obligation to review defendants' untimely objections, thoughtfully and thoroughly reviewed the report and recommendation and explained why defendants' position should be rejected. The record before us does not support defendants' claim that they were denied a fair and impartial hearing. Accordingly, we find no abuse of discretion in the district court's denial of defendants' recusal motion.

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[5] Defendants argue that even though Judge Gwin disclaimed any prejudgment, it was not until after the issue of Judge Limbert's statements was raised that Judge Gwin did so. Thus, defendants argue, the *appearance* of prejudgment endured for a period of weeks. The period of apparent bias is attributable solely to defendants' own conduct in delaying their filing of a recusal motion or otherwise notifying the court of Judge Limbert's statements. Defendants may not now rely on their own dilatory behavior in support of their claim of bias.

V.

The remaining issues presented on appeal involve defendants' challenge to the district court's rulings on the parties' cross motions for summary judgment. Having determined that the district court committed no error in finding that the parties settled their dispute and effected a mutual release of all claims, any dispute as to the district court's prior rulings on the merits of the their claims have been rendered moot. We therefore need not reach the merits of the district court's disposition of the parties' summary judgment motions.

VI.

For the foregoing reasons, we (1) affirm the district court's order enforcing the parties' oral settlement agreement in accordance with the terms specified in that order; (2) affirm the district court's denial of the motions for recusal; and (3) dismiss the remainder of the appeal as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 4:04-CV-2529

[Filed April 7, 2006]

CATHERINE BOSLEY, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
21 WFMJ, *et al.*	)
	)
Defendants.	)
	)

ORDER AND OPINION

[Resolving Doc Nos. 333, 347, 348, 371, 372, 380, 381]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

With their motion, the Plaintiffs move to enforce the settlement that they say the parties agreed to on November 23, 2005 [Doc. 333]. On February 24, 2006, Magistrate Judge George J. Limbert, on referral from

this Court, recommended that the Court enforce the settlement and grant the Plaintiffs' motion [Doc. 367]. Although the Defendants filed objections to the Report [Docs. 376-78], the Plaintiffs moved that they be stricken as untimely [Doc. 380]. The Defendants concede that the objections were untimely but move the Court to consider them anyway [Doc. 381].

For the reasons described below, the Court adopts the Magistrate's Report. The Court finds that the parties agreed, in their oral agreement of settlement, to the terms as outlined in the Magistrate's Report & Recommendation. Therefore, the Court GRANTS the Plaintiffs' motion to enforce the settlement agreement reached on November 23, 2005; DENIES the Plaintiffs' motion to vacate the Court's November 26, 2005 Order of Settlement; DENIES the Plaintiffs' motion to withdraw their motion to enforce the settlement agreement; DENIES the Defendants' motions to supplement the record; GRANTS the Plaintiffs' motion to strike the Defendants' objections; DENIES the Defendants' motion for leave to file objections to the Magistrate Judge's Report And Recommendation; and ADOPTS Magistrate Judge Limbert's Report & Recommendation in full.

I. Background

The history of this case is long and tumultuous. The Magistrate's Report & Recommendation provides a full recitation of the relevant facts. In brief, on November 23, 2005, the parties purported to reach an oral agreement to settle the case [Doc. 329]. Soon thereafter, the Plaintiffs filed the present motion to enforce the settlement agreement. With their motion

to enforce the settlement, the Plaintiffs contend that Defendants attempted to renege upon their contract to settle the case by conditioning the execution of settlement documents upon Plaintiffs' agreement to additional terms never discussed and never agreed upon. [Doc. 333].

This Court referred the matter to Magistrate Judge George J. Limbert pursuant to Local Rule 72.1. On February 24, 2006, Magistrate Judge Limbert issued a Report & Recommendation. The Report recommends, *inter alia*, that the Court enforce the parties' oral settlement agreement.

On March 15, 2006, nineteen days after the Report issued, Defendants Michelle Nicks, John Urchek, and WFMJ Television, Inc. filed objections to the Report. The Plaintiffs moved to strike the objections as untimely [Doc. 380]. In response, the Defendants admitted that they miscalculated the deadline for filing their objections. Arguing that "excusable neglect" caused the delay, they asked the Court to consider their objections and review the magistrate's Report and Recommendation. [Doc. 381].

II. Standard of Review

The Sixth Circuit holds that a district court bears no obligation to review a magistrate's report unless a party has filed a timely objection. *Thomas v. Arn*, 474 U.S. 140, 145 (1985). Absent objection, a district court may adopt the magistrate's report without review. *Id.* at 149. Therefore, as a threshold matter the Court determines whether the Defendants' untimely

objections to the Magistrate's Report should be stricken.

III. Analysis

A. Whether Untimely Objections Should be Considered

The Federal Rules of Civil Procedure state that "[w]ithin 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made." Fed. R. Civ. P. 72(a). Rules 6(a) and 6(e) elaborate on the process for calculating the allowed time. Fed. R. Civ. P. 6(a),(e). Under the proper computation, the parties had until March 13, 2006 to object to the Report. The Defendants admit that they filed their objection two days past this deadline, on March 15, 2006.

The Sixth Circuit has interpreted Rule 72 to mean that a party that fails to file its objections within ten days of service (using the Rule 6 calculation method) waives its right to appeal. *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981) (holding that "a party shall be informed by the magistrate that objections must be filed within ten days or further appeal is waived"). Moreover, Northern District of Ohio Local Rule 72.3(b) states that "failure to file timely objections within the ten (10) day period shall constitute a waiver of subsequent review, absent a showing of good cause for such failure."

Under some circumstances, a court may consider an untimely filed objection. Federal Rule of Civil Procedure 6(b) describes the method for calculating filing deadlines and the conditions under which a court may modify those deadlines. The Rule provides that "where the failure to act was the result of excusable neglect" a court may enlarge the time period. Fed. R. Civ. P. 6(b). And Local Rule 72.3(b) allows the late-filing party to avoid waiver of review upon "a showing of good cause" for the failure to timely object[1]. The Court therefore determines whether the Defendants show "excusable neglect" or "good cause" for their untimely objections.[2]

To find excusable neglect, a court need not find that circumstances beyond the party's control caused the late filing. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392 (1993). However, the Supreme Court holds that "mistakes construing the rules do not usually constitute 'excusable' neglect." *Id.*

Here, the Defendants do not allege that any hardship or unusual external circumstances

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[1] Federal Rule of Civil Procedure 6(b) does not apply to local rules of court. *Kallay v. Cmty. Nat'l Life Ins. Co.*, 52 F.R.D. 139, 142 (N.D. Okl. 1971). Therefore, the "excusable neglect" standard applies only to Federal Rule of Civil Procedure 72(a) in this case and not to the time period established by Northern District of Ohio Local Rule 72.3(b).

[2] The "good cause" standard is generally less stringent than the "excusable neglect" standard. *See Dimmitt v. Ockenfels*, 407 F.3d 21, 24 (1st Cir. 2005).

contributed to their delinquency. Their only justification for their tardiness is their misunderstanding of the rules. The Defendants go to great lengths to argue that their interpretation was common, and thus reasonable. However, as the Plaintiffs' point out, well-known and readily accessible legal authority describes the proper interpretation of the relevant rule:

> Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added days.

Fed. R. Civ. P. 6(e) advisory committee's note. Moreover, the note gives an illustration that is largely similar to the present situation:

> Application of Rule 6(e) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays and legal holidays are excluded in determining when the period expires under Rule 6(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 6(e) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday.

Id. This language, of which the Defendants should have been aware, leaves no room for the Defendants' misinterpretation.

Moreover, by filing their objection on what they believed was the deadline based on a relatively sophisticated calculation process, the Defendants assumed the risk that they would be mistakenly untimely file. The Defendants were well aware of the potential difficulty in determining the proper deadline: Defendant WFMJ Television was forced to re-file its intention to object [Doc. 369] after having already misinterpreted the rule once. Therefore, the Defendants cannot claim to have been completely caught unaware; they had already wrestled with question of the proper computation. They were on notice of the nature of the computation and the risk of failing to properly compute the time. Despite this, they chose to err not on the side of caution, but of risk.

As stated, "mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer Inv. Servs.*, 507 U.S. at 392. For the reasons described above, this case presents no basis for an exception to that rule. The Defendants' objections were untimely and are stricken.

Because no party filed a valid objection to the Magistrate's Report & Recommendation, this Court need not review the Magistrate's findings. *Thomas*, 474 U.S. at 145. Instead, the Court may – and does – adopt the Report without review. *Id.*

B. The Magistrate's Report Reviewed

Even if the Court were required to review the Magistrate's report, the Court would still adopt the Magistrate's recommendation. Upon review of the record and the Magistrate's Report, this Court finds the analysis thorough and the findings well-substantiated. The Defendants' objections to the Report do not persuade the Court otherwise, they approach the laughable. This Court therefore adopts Magistrate Judge Limbert's Report & Recommendation in full.

In that Report & Recommendation, Magistrate Judge Limbert found the parties had reached a settlement:

> [T]he parties in this case had indeed settled the entire case. Both of the attorneys who entered into the oral agreement consistently testified as to the essential terms of the oral settlement, including the agreed-upon amount that Defendants would pay Plaintiffs, confidentiality as to that amount, a mutual release of all claims by all parties, which the undersigned finds included Defendants' counterclaims, a release of every party named in Plaintiffs' complaint, which includes those individuals, "affiliates, employees, agents, parents, or subsidiaries of Defendants 21 WFMJ, WFMJ Television, Inc. . . . and/or entities otherwise associated with these Defendants who had the right and ability to supervise the activities alleged herein and received a direct financial benefits from this misconduct" and those "owners, officers,

> employees, and/or agents of Defendants 21 WFMJ, WFMJ Television, Inc. . . . who have directly or indirectly participated in the illegal distribution, copying, reproduction, selling, and/or illegal editing of copyrighted works owned by Plaintiffs and/or who had the right and ability to supervise the activities alleged herein and received a direct financial benefit from this misconduct. . .

[Doc. 367 at *5-6].

In reaching this recommendation, the Magistrate Judge relied upon uncontradicted evidence. Recall, the parties acknowledge agreement upon the amount of the settlement but disagreed regarding two elements of the settlement they had reached: 1) did the Defendants agree to waive any claim of confidentiality except as to the amount of the settlement; and 2) did the Plaintiff agree to release claims against parties associated with the Defendant although not specifically joined as a defendant.

Regarding the extent of the confidentiality agreement, Plaintiffs Attorney Kabat and Defense Attorney Bolton were the only parties to the conversation during which the settlement was reached. Plaintiffs Attorney Kabat described his discussion with Defense Attorney Bolton:

> A Our conversation [regarding confidentiality] was very simple. Mr. Bolton said to me, we need confidentiality. And I said to him, the only thing my client is willing to agree to is to keep the amount of the settlement confidential. He said to

me, that will work. That was the extent of the conversation.

(Hr'g Mot. Enforce Settlement, Tr. at 17, Jan. 30, 2006.)

Importantly, Defendant Attorney Bolton agreed that the sole agreement reached only required the Plaintiffs to keep the amount of the settlement confidential. He testified:

Q What I agreed to that night was to keep the amount of the settlement confidential; correct?

A That's what I just said.

Q Nothing more; nothing less; correct?

A I didn't understand that to be exclusive.

Q But there was nothing discussed?

A But there was nothing else to talk about. That was -- that was -- all we had talked about that night was price.

Q Correct. And you thought when you walked away, in your words, that that meant that the figure, the amount your clients were going to pay, was off limits; right?

A I thought that the figure could not be discussed or referred to; right.

Q Right. And when I said to you, I will agree not to disclose the amount of the settlement, the figure, you said, okay, that will work. Do you remember that?

A I don't remember saying that will work. What I remember saying is, that is reasonable.

(Hr'g Mot. Enforce Settlement, Tr. at 99, Jan. 30, 2006.) Defendant Attorney Bolton further testified:

Q And after talking to me, the only thing that we had reached an agreement on was to keep the price confidential; right?

A We had agreed to keep the one thing - - the one part of our agreement that we had actually come to terms on confidential, yes. I couldn't ask for more than that at the time.

(Hr'g Mot. Enforce Settlement, Tr. at 30, Jan. 30, 2006.)

With its filings and testimony, Defendants acknowledge that Bolton and Kabat agreed that only the amount of the settlement would be kept confidential. Defendants seem to contend that some unexpressed conditions needed to be included in the settlement contract before it became effective. In opposing the motion to enforce a settlement, Defendant WFMJ did not dispute the terms of the settlement claimed by Plaintiffs. Instead, the defendants argued that they should be permitted to bargain for additional

terms after agreement had been reached. Thus, Defendant WFMJ says:

> "In that conversation and thousands of other informal settlement talks like it, the lawyers agreed whether there would be a payment of an amount, and upon several major issues needed for a final settlement agreement. *They did not agree to confine all settlement terms to those addressed on the phone; nor did they agree to confine all settlement terms that they did discuss to the literal words uttered in the conversation.* "

[Doc. 334 at *3, Bolton affidavit at ¶ 8].

Obviously, this is wrong. Under contract law, courts consider objective manifestations of intent, not undisclosed desires. Whether there has been meeting of minds or mutual assent is judged by objective standard, looking to expressed words of parties and their visible acts. Expressions of assent are sufficient to show a meeting of the minds, irregardless of some hope that the other party might later agree to some additional undisclosed condition, especially where the undisclosed condition vary from the expressed agreement.

Defendant Counsel makes the disingenuous argument that the parties had not understood a settlement had been reached. The argument is belied in numerous ways as described by the Magistrate Judge. First, Defendant Attorney Marburger filed a notice saying: "Defendants WFMJ Television, Inc., Michelle Nicks, and John Urchak hereby notify the

Court that they have effectively reached a settlement with the plaintiffs. The documents consummating the settlement are being drafted now." [Doc. 329]. The filing nowhere said that negotiations were close but not closed. It nowhere made any request for additional time to complete claimed unfinished negotiations. Plaintiffs filed no objection to this notice. Obviously, the parties believed that a settlement was reached.

In reaction to this filing, the Court placed an order, saying, in part: "Upon representation of counsel that the above-captioned case has been settled between the parties, IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice." [Doc. 331]. Neither Defendants, nor Plaintiffs filed any indication that the case had not been settled. In addition, for some reason, on December 27, 2006, Defendants filed a notice of appeal from certain of this Court's preliminary rulings. [Doc. 336]. In that filing, Defendants never contend that this Court erred in saying this case had been settled.

Attorney Bolton gave further testimony belying the argument that they did not understand a settlement had been reached. Referring the November 23, 2005, settlement conversation with Kabat, Bolton testified: "I do recall saying that I would try to provide a release or a settlement agreement, I don't remember which term I used, and a check within seven days." (Hr'g Mot. Enforce Settlement, Tr. at 91, Jan. 30, 2006.) This testimony begs the obvious question: if, as Defendants now contend, a settlement had not been reached, how could Bolton provide a release? If a settlement had not been reached, why would Bolton promise to get the settlement money to Kabat and

Plaintiffs within seven days? If a settlement had not been reached, why were no arraignments made to discuss the conditions that Defendant now say were unresolved?

Defendant Counsel's belated claim that they did not intend to fully settle the case is not believed. Although acknowledging that Bolton expressed agreement to the confidentiality provision that only limited disclosure of the dollar value of the settlement, Defendants suggest that it could refuse settlement if Plaintiffs refused to accede to additional, and previously not disclosed, conditions. However, settlements, like all other contracts necessarily are determined by overt expressions. Undisclosed reservations cannot trump expressed conditions. Here, both Defense Attorney Bolton and Plaintiffs Attorney Kabat agreed that only the dollar amount of the settlement would remain confidential. That Plaintiffs do not agree to some later proposal to add to the settlement terms does not invalidate the agreement as to the original terms. No evidence suggests that Defendants anyway conditioned their agreement to the settlement on the subsequent resolution of undisclosed conditions. The Magistrate Judge got it completely correct.

Defendants make one further argument regarding why the settlement agreement they reached should not be enforceable. Defendants suggest that Bosley misled them when she failed to advise them that she might appear on the Oprey Winfrey television show to

discuss the litigation[3]. In support of this argument, the Defendant show no material misstatement by Bosley's counsel, instead they argue Bosley had some duty to volunteer information that she might publicize the litigation.

Generally, silence cannot form the basis of a fraud claim. The failure to disclose a particular fact is only actionable where there exists a duty of disclosure. *See Burr v. Board of County Com'rs of Stark County*, 23 Ohio St.3d 69, 69, 491 N.E.2d 1101, 1102 (Ohio1986) (holding that the first element of a fraud in the inducement claim is "a representation or, where there is a duty to disclose, concealment of a fact"). The circumstances under which the law recognizes such a duty have traditionally been limited to: (1) the existence of a fiduciary relationship between the parties, *see Schulman v. Wolske & Blue Co., L.P.A.*, 125 Ohio App.3d 365, 372, 708 N.E 2d 753, 758 (Ohio App. 10 Dist. 1998); and (2) relationships in which "one party imposes confidence in the other because of that person's position, and the other party knows of this confidence." *Central States Stamping Co. v. Terminal Equipment Co., Inc.*, 727 F.2d 1405, 1409 (6th Cir. 1984) (citing *Smith v. Patterson*, 33 Ohio St. 70, 75-76 (Ohio 1877)).

The Defendants proffer no argument that such a relationship exists in the instant case. Indeed, the Court finds no reason why Plaintiffs would have any

---

[3] That the saga of this litigation would be of any interest to the television public speaks volumes regarding the intelligence of television audiences.

duty to inform the Defendants that Bosley may in the future discuss the instant lawsuit.

The Defendants' argument is ridiculous. First, Defendant WFMJ is a sophisticated corporation that has employed at least eight attorneys on this litigation, generating at least 394 filings to date. Second, the case originated with Bosley appearing at a Key West bar and taking her clothes off to dance naked before an assemble mob, hardly the shy-and-retiring-type who would forgo embarrassing herself if it meant more publicity. Third, Bosley and Defendants are complete antagonists. Finally, Plaintiffs' counsel Kabat was clear that Bosley rejected any confidentiality provision other than one involving the value of the settlement. Nothing suggests the existence of a fiduciary relationship between the parties or that the Defendants imposed any confidence in Bosley. The Defendants' argument that the settlement contract was voidable because Bosley did not disclose any plans she had to go publicize the settlement fails.

Finally, the Magistrate Judge correctly found in Defendants' favor in concluding that the parties agreed to mutual releases and Plaintiffs were obligated to release all claims and every party named in Plaintiffs' complaint, including affiliates of Defendant WFMJ Television Inc. Plaintiffs' complaint alleged causes of action against affiliates and employees of affiliates of

Defendant WFMJ[4]. Describing the settlement discussion relating to who would be released, Plaintiffs Attorney Kabat testified:

> A . . I asked him, since we were having a dispute as to the money, I said, who are you negotiating for? Is it just WFMJ, because I had not heard Mr. Lanzo say a word that day or Mr. Juhasz say a word that day, and I was hopeful that maybe I could get some money out of Miss Nicks and Mr. Urchek. And Mr. Bolton said to me, no, I'm negotiating *on behalf of all the defendants,*

---

[4] In part, Plaintiffs's complaint alleged:

> 14. The identities of XYZ Companies 1-50, PDQ Companies 1-50, John Does 1-50, and Jane Does 1-50 are not presently known. This Complaint will be amended to include the names of such individuals and entities when identified.
>
> 15. Upon information and belief, XYZ Companies 1-50 are affiliates, employees, agents, parents, or subsidiaries of Defendants 21 WFMJ, WFMJ Television, Inc., and/or Andrews Cycles, Inc., and/or entities otherwise associated with these Defendants who had the right and ability to supervise the activities alleged herein and received a direct financial benefit from this misconduct.
>
> 16. Upon information and belief, John Does 1-50 are owners, officers, employees, and/or agents of Defendants 21 WFMJ, WFMJ Television, Inc., Andrew Cycles, Inc., and/or and/or who had the right and ability to supervise the activities alleged herein and received a direct financial benefit from this s misconduct.
>
> [Doc. 1 at *3-4]

> *and this will resolve the case for all of the defendants* (Emphasis added.).

(Hr'g Mot. Enforce Settlement, Tr. at 9, Jan. 30, 2006.) Kabat further explained "[t]hat there would be no claims pending against our clients, the plaintiffs, and there would be no claims pending *against the defendants that were named in the lawsuit*." (Hr'g Mot. Enforce Settlement, Tr. at 10, Jan. 30, 2006.) (Emphasis added.) As described above, Plaintiffs' complaint made claims against "affiliates, employees, agents, parents, or subsidiaries of Defendants 21 WFMJ, WFMJ Television, Inc., and/or entities otherwise associated with these Defendants who had the right and ability to supervise the activities alleged . . ." Defense Attorney Bolton gave similar testimony. He testified that "[t]he plaintiffs would release claims against the defendants; defendants would release the claims against the plaintiffs." (Hr'g Mot. Enforce Settlement, Tr. at 96, Jan. 30, 2006.)

A general release, not restricted by its terms to particular claims or demands, ordinarily releases all claims and demands which could have been brought and were known to the parties at the time of the release. Unless expressly excepted, known claims die with the general release. *Overberg v. Lusby*, 727 F. Supp. 1091, 1093 (E.D. Ky. 1990) ("If the parties intended to leave some things out of a general release, then 'their intent to do so should be made manifest.'") (quoting *United States v. William Cramp & Sons Ship & Engine Bldg. Co.*, 206 U.S. 118, 128 (1907)), aff'd 921 F.2d 90 (6th Cir. 1990).

The Magistrate Judge found the settlement released all claims. The Magistrate had more than sufficient support for this finding and the Court adopts the Magistrate Judge's finding and reasoning.

C. The Defendants' Motion to Supplement

Defendants separately move this Court to supplement the record of their January 30, 2006 hearing before Magistrate Judge Limbert to include their affidavits averring that Magistrate Limbert told them during settlement discussions that he had been directed to enforce the settlement agreement. The motion is odd for several reasons. First, Defendants allege that Magistrate Judge Limbert made this statement on January 30, 2006, during settlement discussions *before the hearing*. Despite having an ability to make a record of the statement in the hearing that followed the settlement discussions, Defendants said nothing, suggesting that Defendants' counsel attached no significance to the purported statement. Any competent counsel understand it is important for the record to reflect all meaningful case-related matter.

Moreover, the hearing on the motion to enforce the settlement closed on January 30, 2006. Judge Limbert then afforded the parties two weeks to file briefing. Defendants then filed a brief, an amended brief, a forty-one page supplemental brief and a substitute brief. Despite hundreds of pages of briefing (most would say overkill that reflects their weak argument) the Defendants made no argument that Judge Limbert would not fairly decide the issues. That defense counsel would spend tens of thousands of their client's

money on the briefing papers betrays their later claim that they interpreted Judge Limbert's statement to reflect that no fair consideration of their arguments would be given.

Only when Judge Limbert decided the case against them on February 24, 2006, did Defendant file this belated motion to supplement the record result. The motion is pointless. First, the Court referred the matter to Magistrate Judge Limbert for a report and recommendation. With his February 24, 2006, Report and Recommendation, the referral ends. Despite numerous opportunities to include the affidavits in the record before the Magistrate made his Report, Defendant failed to do so. They have now filed the affidavits with this Court and the affidavits are part of this Court's record. No purpose would be served by including the affidavits as if they had been before Judge Limbert.

Second and as described below, without justification, the Defendants have failed to timely object to the Magistrate's Report and Recommendation. Having failed to comply with this time requirement, the Defendant cannot appeal. Civil Rule 72 says, in part:

> Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made.

In *Thomas v. Arn*, the Sixth Circuit found that a plaintiff's failure to file timely objection to the report and recommendation of a magistrate waived further appeal to the circuit court. 728 F.2d 813 (6th Cir. 1984) (citing *Walters*, 638 F.2d at 947). The Supreme Court affirmed. *Thomas*, 474 U.S. at 140; *United States v. Hunter*, 4 Fed. Appx. 295, 2001 WL 128297 at *4 (6th Cir. 2001) ("In order to preserve an issue for appeal, a defendant is required to file objections with the district court to the findings of the magistrate judge.")

Because the Defendants' failure to timely object waived their right to appellate review of this holding, the Defendants' motions to supplement the record is now moot. Accordingly, the motion is denied.

IV. Conclusion

For the reasons described below, the Court finds that the parties agreed, in their oral agreement of settlement, to the terms as outlined in the Magistrate's Report & Recommendation. Therefore, the Court **GRANTS** the Plaintiffs' motion to enforce the settlement agreement reached on November 23, 2005; **DENIES** the Plaintiffs' motion to vacate the Court's November 26, 2005 Order of Settlement; **DENIES** the Plaintiffs' motion to withdraw their motion to enforce the settlement agreement; **DENIES** the Defendants' motions to supplement the record; **GRANTS** the Plaintiffs' motion to strike the Defendants' objections; **DENIES** the Defendants' motion for leave to file objections to the Magistrate Judge's Report And Recommendation; and **ADOPTS** Magistrate Judge Limbert's Report & Recommendation in full.

IT IS SO ORDERED.

Dated: April 7, 2006

s/James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed November 25, 2005]

CATHERINE BOSLEY,	)
RICHARD BROWN,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
WFMJ, Television, Inc., *et al.*,	)
	)
Defendants.	)
	)

Notice of Settlement

Defendants WFMJ Television, Inc., Michelle Nicks, and John Urchak hereby notify the Court that they have effectively reached a settlement with the plaintiffs. The documents consummating the settlement are being drafted now. They have not yet been circulated, or (obviously) signed. Accordingly, there is no need to impanel a jury for trial on Monday, November 28, 2005.

/s/ David L. Marburger
David L. Marburger (0025747)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
E-mail: dmarburger@bakerlaw.com
E-mail:arupert@bakerlaw.com

Stephen T. Bolton, Esq. (0010994)
Manchester, Bennett, Powers & Ullman
Atrium Level Two
The Commerce Building
201 East Commerce Street
Youngstown, Ohio 44503
Telephone: (330) 743-1171
Facsimile: (330) 743-1190
Attorneys for Defendant
WFMJ Television, Inc.

/John Juhasz/
John Juhasz (0023777)
7330 Market Street
Youngstown, Ohio 44512-5610
Telephone: 330.758.2308
Facsimile: 330.758.8290
E-mail: Jbjjurisdoc@yahoo.com
Attorney for Defendant Michelle Nicks

/James E. Lanzo/
James E. Lanzo (0069530)
4126 Youngstown-Poland Rd.
Youngstown, Ohio 44514
E-mail: attylanzo@aol.com
Attorney for Defendant John Urchak

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically on November 25, 2005, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for plaintiffs.

/s/ David L. Marburger
David L. Marburger

500960127.1, Notice of Tentative Settlement

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 4:04CV02529

[Filed November 26, 2005]

CATHERINE BOSLEY, ET AL.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
21 WFMJ, ET AL.,	)
	)
Defendants.	)
	)

ORDER

Upon representation of counsel that the above-captioned case has been settled between the parties, IT IS ORDERED that the docket be marked, "settled and dismissed with prejudice."

Any subsequent order setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within order.

FURTHER, the Court retains continuing jurisdiction to resolve disputes concerning the memorialization of this settlement agreement. *See Kokkonen* v. *Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

Dated: November 26, 2005

s/ *James S. Gwin*
JUDGE JAMES S. GWIN
UNITED STATES DISTRICT JUDGE

APPENDIX E

Case: 4:04-cv-02529-JG As of: 11/20/2007
04:40 PM EST 1 of 1

Appeal, Cat11, LCI, Limbert, MotRef, Standard, Stay, Termed

U. S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
(Youngstown)

CIVIL DOCKET FOR CASE #: 4:04–CV–2529–JG

[Excerpt, Page 1, dated November 20, 2007]

Bosley et al v. 21 WFMJ et al
Assigned to: Judge James S. Gwin
Case in other court: 6th Circuit, 06-03091
6th Circuit, 06-03624
6th Circuit, 06-03625
6th Circuit, 06-03626
6th Circuit, 06-03894
6th Circuit, 06-03895
Cause: 17:101 Copyright Infringement

Date Filed: 12/23/2004
Date Terminated: 11/26/2005
Jury Demand: Both
Nature of Suit: 820 Copyright
Jurisdiction: Federal Question

Date Filed	#	Docket Text
01/19/2006	346	FILED IN ERROR - ATTORNEY TO REFILE AS A MOTION - Notice of *Withdrawal of Motion to Enforce Settlement Agreement Reached on November 23, 2005* filed by all plaintiffs. Related document(s) 333 . (Polk, Shannon) Modified text on 1/20/2006 (S, T). (Entered: 01/19/2006)
01/19/2006	347	Motion to vacate *11/26/05 Order Marking this Case as Settled and Dismissed and for a New Date for the Trial of Plaintiffs' claims* filed by all plaintiffs. Related document(s) 331. (Polk, Shannon) Modified on 1/23/2006 to unterminate motion (S, A). (Entered: 01/19/2006)
01/20/2006	348	Motion to Withdrawal Document Motion to Enforce Settlement Agreement Reached On November 23, 2005 filed by all plaintiffs. Related document(s) (346, 333.) (Polk, Shannon) Modified text on 1/23/2006 (S, T). Modified on 1/23/2006 to unterminate motion (S, A). (Entered: 01/20/2006)

Date Filed	#	Docket Text
01/23/2006	349	Order: An evidentiary hearing and oral argument are scheduled upon plaintiffs' motion to enforce settlement before Magistrate Judge Limbert in Youngstown, Ohio, on 1/30/06 at 1:00 p.m. (Related documents 337 and 333). Signed by Magistrate Judge George J. Limbert on 1/23/06. (S, A) (Entered: 01/23/2006)
01/23/2006		Order (non-document) denying as moot defendant WFMJ Television, Inc.'s motion to reschedule the conference hearing for evidentiary hearing (Related Doc # 343). Entered on behalf of Magistrate Judge George J. Limbert on 1/23/06. (S, A) (Entered: 01/23/2006)

Date Filed	#	Docket Text
01/23/2006		DOCUMENT FILED IN ERROR; MOTION IS STILL PENDING; Order (non-document) denying as moot plaintiffs' motion to vacate the 11/26/05 order marking this case as settled (Related Doc # 347). Entered on behalf of Magistrate Judge George J. Limbert on 1/23/06.(S, A) Modified on 1/23/2006 (S, A). (Entered: 01/23/2006)
01/23/2006		DOCUMENT FILED IN ERROR; MOTION IS STILL PENDING; Order (non-document) denying as moot plaintiffs' motion to enforce plaintiffs' notice of withdrawal of motion to enforce settlement agreement reached on 11/23/05 (Related Doc # 348). Entered on behalf of Magistrate Judge George J. Limbert on 1/23/06. (S. A) Modified on 1/23/2006 (S, A). (Entered: 01/23/2006)

APPENDIX F

Case 4:04-cv-02529-JG Document 346 Filed 01/19/2006 Page 1 of 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed January 19, 2006]

CATHERINE BOSLEY, *aka* CATHERINE BALSLEY, et al.,	)
Plaintiffs,	)
-vs-	)
21 WFMJ, et al.	)
Defendants.	)

PLAINTIFFS' NOTICE OF WITHDRAWAL OF MOTION TO ENFORCE SETTLEMENT AGREEMENT REACHED ON NOVEMBER 23, 2005

Plaintiffs, by and through counsel, hereby withdraw their Motion to Enforce Settlement

Agreement Reached on November 23, 2005, which was filed on December 15, 2005.

Respectfully submitted,

s/ Shannon J. Polk
SHANNON J. POLK (0072891)
HABER ▪ POLK, LLP
Eaton Center, Suite 620
1111 Superior Avenue
Cleveland, Ohio 44114
Phone: (216) 241-0700
Fax: (216) 241-0739
Email: spolk@haberpolk.com

s/ Andrew A. Kabat
ANDREW A. KABAT (0063720)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue,
West Cleveland, Ohio 44115
Phone: (216) 687-1311
Fax: (216) 687-1841
Email: akabat@reminger.com

Case 4:04-cv-02529-JG Document 346
Filed 01/19/2006 Page 2 of 2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Shannon J. Polk
ANDREW A. KABAT (0063720)
SHANNON J. POLK (0072891)

APPENDIX G

Case 4:04-cv-02529-JG Document 348 Filed 01/20/2006 Page 1 of 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed January 20, 2006]

CATHERINE BOSLEY, *aka* CATHERINE BALSLEY, et al.,	)
Plaintiffs,	)
-vs-	)
21 WFMJ, et al.	)
Defendants.	)

PLAINTIFFS' NOTICE OF WITHDRAWAL OF MOTION TO ENFORCE SETTLEMENT AGREEMENT REACHED ON NOVEMBER 23, 2005

Plaintiffs, by and through counsel, hereby withdraw their Motion to Enforce Settlement

Agreement Reached on November 23, 2005, which was filed on December 15, 2005.

Respectfully submitted,

s/ Shannon J. Polk
SHANNON J. POLK (0072891)
HABER ▪ POLK, LLP
Eaton Center, Suite 620
1111 Superior Avenue
Cleveland, Ohio 44114
Phone: (216) 241-0700
Fax: (216) 241-0739
Email: spolk@haberpolk.com

s/ Andrew A. Kabat
ANDREW A. KABAT (0063720)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue,
West Cleveland, Ohio 44115
Phone: (216) 687-1311
Fax: (216) 687-1841
Email: akabat@reminger.com

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/s/ Shannon J. Polk
ANDREW A. KABAT (0063720)
SHANNON J. POLK (0072891)

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 4:04-CV-02529

[Filed January 19, 2006]

CATHERINE BOSLEY, *aka* CATHERINE BALSLEY, et al.,	)
Plaintiffs,	)
-vs-	)
21 WFMJ, et al.	)
Defendants.	)

PLAINTIFFS' MOTION TO VACATE 11/26/05 ORDER MARKING THIS CASE AS SETTLED AND DISMISSED AND FOR A NEW DATE FOR THE TRIAL OF PLAINTIFFS' CLAIMS

Plaintiffs, by and through counsel, hereby ask this Court to: (1) vacate its 11/26/05 Order, which marked the case settled and dismissed based upon Defense counsel's written representation that a settlement had been reached; and (2) place this case back on the

Court's active docket and issue a new date for the trial of Plaintiffs' claims at the Court's earliest availability. Plaintiffs' lead counsel will be engaged in a trial starting February 15, 2006, which will last about seven (7) days before the Cuyahoga County Court of Common Pleas, Honorable Michael Russo, captioned *Americab v. Cohen & Co.* Plaintiffs' counsel is available/can make himself available for trial any time after that trial.

The grounds for this motion are simple and straightforward. Following specific negotiations, Plaintiffs considered this case resolved - and so did the Defendants. However, after agreeing to specific terms, Defendants refused to honor their commitments. This was detailed in prior pleadings.

Unable to resolve matters without Court intervention, on December 25, 2005, Plaintiffs filed a motion to enforce their November 23, 2005 settlement agreement. This Court referred that Motion to Magistrate Limbert on January 6, 2006. On January 12, 2006, Magistrate Limbert scheduled a hearing for January 18, 2006. However, that hearing did not go forward due to the unavailability of the Defendants and/or their counsel.[1] In fact, as recent as yesterday afternoon, while trying to arrange for an alternative

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[1] Originally, lead counsel for Plaintiffs had a conflict with the January 18, 2006 date, so the parties jointly sought a new date for the hearing. However, soon thereafter, lead counsel for Plaintiffs resolved his conflict, made himself available for the January 18, 2006 hearing well in advance of that date, and also communicated these same facts to Defendants' counsel.

hearing date in the near future, Defendants' counsel, David Marburger, represented that Defendants are unable to go forward with any hearing on this issue until sometime in February. Mr. Marburger has taken this position because *he* in particular is apparently not available, despite the fact that he is unnecessary for any evidentiary hearing regarding Plaintiffs' motion to enforce because he played absolutely no role in the settlement discussions which were the subject of that motion. Candidly, the Defendants are represented by a host of attorneys in this case, and any of those lawyers should be capable of appearing on behalf of the Defendants, with or without Mr. Marburger.

It has been almost two months since the Defendants agreed to a resolution of this case. Nevertheless, Plaintiffs are no closer to actually resolving this case than they were back then. Consequently, Plaintiffs ask this Court to vacate its 11/26/05 Order, which marked the case settled and dismissed; and (2) place this case back on the Court's active docket and issue a new date for the trial of Plaintiffs' claims at the Court's earliest availability.

Respectfully submitted,

s/ Shannon J. Polk
SHANNON J. POLK (0072891)
HABER ▪ POLK, LLP
Eaton Center, Suite 620
1111 Superior Avenue
Cleveland, Ohio 44114
Phone: (216) 241-0700
Fax: (216) 241-0739
Email: spolk@haberpolk.com

s/ Andrew A. Kabat
ANDREW A. KABAT (0063720)
REMINGER & REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue,
West Cleveland, Ohio 44115
Phone: (216) 687-1311
Fax: (216) 687-1841
Email: akabat@reminger.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Shannon J. Polk
ANDREW A. KABAT (0063720)
SHANNON J. POLK (0072891)

APPENDIX I

Baker & Hostetler LLP
3200 National City Center
1900 East 9th Street
Cleveland, OH 44114-3485

T 216.621.0200
F 216.696.0740
www.bakerlaw.com

August 2, 2007

VIA HAND DELIVERY

David L. Marburger
direct dial: 216.861.7956
dmarburger@bakerlaw.com

Andrew Kabat, Esq
Reminger & Reminger Co., L.P. A.
1400 Midland Building
101 West Prospect Avenue
Cleveland, Ohio 44114

Richard Haber, Esq. and Shannon Polk, Esq.
Haber Polk LLP
1111 Superior Avenue - Suite 620
Eaton Center
Cleveland, Ohio 44114

Re: Bosley v. WFMJ et al.

Gentlemen:

Unconditional offer to pay

The court of appeals' of opinion is to affirm the district court's order granting Ms. Bosley's motion to enforce settlement and we anticipate the court of appeals to issue a mandate consistent with that opinion. In obedience to the court of appeals' opinion and anticipated mandate, we offer to pay the entire settlement amount plus post-judgment interest (which this letter describes in more detail later).

Also:

(a) You have twice moved the district court for an order awarding the payment of attorneys' fees incurred in the plaintiffs' litigating in that court from December, 2005, through May, 2006, which didn't succeed because of procedural miscues. We opposed those motions. In resolving them, the district court did not reject the substantive grounds that you presented.

(b) You have threatened to move for the same sanctions again, and presumably will comply with appropriate procedures.

As a result of all of that, we will pay the following funds within one to three business days after you notify us as to how and to whom we should pay the funds:

1. Settlement amount. The entire settlement amount, which is [redacted].

2. **Post-judgment interest.** Post-judgment interest added to the [redacted] and to the pre-judgment interest described in paragraph 3, calculated from the date of the district court's opinion of April 7, 2006, granting Ms. Bosley's motion to enforce settlement, through the end of this week, at 4.77% as per 28 U.S.C. § 1961. That interest payment is [redacted].

3. **Prejudgment interest.** Pre-judgment interest on the [redacted] measured from seven days after Mr. Bolton's November 23, 2005, cell phone conversations with Mr. Kabat — December 1, 2005 — through April 6, 2006 (the day before the district court granted the motion to enforce settlement).

(a) That pre-judgment interest is calculated at 6% under Ohio Revised Code § 1343.03, 5703.47, and the Ohio Tax Commissioner's determination governing the year 2006.

(b) That pre-judgment interest payment is [redacted]

4. **Attorneys' fees.** $20,000, assuming that covers all reasonable attorneys' fees for services rendered by Reminger & Reminger, and Haber Polk for litigating in the district court for the period beginning December, 2005, through May, 2006.

To eliminate misunderstanding, this paragraph 4 covers the services of preparing the following items listed on the district court's docket in this case:

motion to enforce settlement	12/15/05	# 333
brief opposing motion to reschedule hearing	1/17/06	# 345
notice withdrawing settlement motion	1/19/06	# 346
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5. **Reasonable attorneys' fees beyond $20,000.** If $20,000 does not cover all reasonable attorneys' fees for services rendered by Reminger & Reminger, and Haber Polk, in litigating in the district court from December, 2005, through May, 2006, please advise us as to how much more than $20,000 would cover all reasonable fees for those services and provide the documentation described below.

The documentation would show all of the services for which each law firm seeks payment for litigating in the district court from December 1, 2005, through May 2006, including those services covered by the $20,000 that this letter offers. The documentation would:

(a) describe each service provided; and

(b) identify each attorney who performed each service; and

(c) list the amount of time spent by each attorney in performing each service; and

(d) list the hourly rate of each attorney who performed each service, as attributed in your firms' record-keeping in December, 2005, and January through May, 2006 for services provided in the Bosley case.

We don't need documentation unless the law firms seek more than $20,000 in reasonable attorneys' fees for litigating in the district court from December, 2005 through May, 2006. You can follow this paragraph 5 even if you accept the offered $20,000.

We would not pay an amount for reasonable attorneys' fees beyond $20,000 if we decided that the added amount is inconsistent with this letter, unreasonable, or if we are uncomfortable with the reliability of the documentation of fees and services that you provide to justify the added amount. When you provide reliable, itemized documentation, we will give you the benefit of the doubt on whether the requested fees are reasonable, which means that we'll resolve doubt in favor of offering to pay those added fees.

6. **Costs.** The full amount of costs to be paid by the defense as shown by the transcript of the testimony of Messrs. Kabat and Bolton in the evidentiary hearing before Magistrate Judge Limbert on January 30, 2006.

Process for making the payments

We will pay the funds described in paragraphs 1 through 4 to you as quickly as practicable after you

notify us how and to whom you want us to pay the money. Obviously, we would pay the money only in a fashion that would document that we actually paid it and to whom, *e.g.* by check. As said at the outset of this letter, we expect to be able to process that money in one to three business days after you tell us how and to whom to pay the money.

As for the funds described in paragraph 5, we will pay those promptly if there are any to be paid as that paragraph describes.

As for costs, we are in the process of calculating the amount of costs to pay to you. We will advise you of that amount, how we figured it, and promptly offer to pay that amount separately.

This offer is not contingent upon your clients or their counsel signing any legal instrument or agreeing to anything except what we would need to document and facilitate payment.

Very truly yours,

David L. Marburger

DLM/tk

APPENDIX J

Reminger & Reminger
ATTORNEYS AT LAW
Andrew A. Kabat
Direct Dial No.(216) 430-2172
Email:akabat@reminger.com

August 3, 2007

VIA EMAIL: dmarburger@bakerlaw.com
AND FACSIMILE: 216-696-0740
David L. Marburger, Esq.
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114-3485

Re: *Catherine Bosley, et al. v. 21 WFMJ, et al.*
United States District Court; Case No.: 4:04CV2529
Our File No.: 9020-07-55578-04

Dear David:

On behalf of the Plaintiffs, we accept your August 2, 2007 "unconditional offer to pay" the funds described in paragraphs 1-4. Please provide the funds to me within the next 1-3 business days by way of certified bank check made payable to Catherine Bosley, Richard Brown and their attorneys Reminger & Reminger Co., L.P.A. Our Tax I.D. No. is 34-1101394.

We believe that we are entitled to attorney fees not only for work performed in connection with the District Court proceedings identified in your letter, but for the appeal as well. Our fees certainly exceed $20,000. I am happy to prepare a detailed billing statement for you to review as requested. However, please understand that, by accepting your unconditional offer to pay items Nos. 1-4, we are not waiving our right to collect fees in excess of $20,000. It is our sincere hope that we can resolve the remaining issue concerning attorney fees amicably and withdraw our pending Motion in the Court of Appeals and forego the filing of a similar motion with the District Court. I will forward the fee statement to you very shortly and then we can discuss this issue further.

Finally, I look forward to receive your calculation as to costs due. We can have a conversation upon receipt of this information. Thank you.

Very truly yours,

REMINGER & REMINGER CO., L.P.A.

Andrew A. Kabat

Andrew A. Kabat

AAK:mo

No. 07-716

FILED
FEB 13 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WFMJ TELEVISION, INC.,

Petitioner,

v.

CATHERINE BOSLEY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

RICHARD C. HABER, ESQ.
Counsel of Record
HABER POLK, LLP
1111 Superior Avenue, Suite 620
Cleveland, Ohio 44114
(216) 241-0700
Counsel for Respondents, Catherine Bosley and Richard Brown

February 13, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Petitioner has challenged the Article III jurisdiction of the District Court to enforce a settlement on the basis that there was no controversy upon the filing of a Notice to Withdraw the Motion to Enforce Settlement. The Respondents assert that following the filing of the Notice, it was refiled as a Motion to Withdraw the Motion to Enforce the Settlement and thereafter the parties litigated the issue of the settlement terms for months before the Court found that a valid settlement agreement existed. Thus, the controversy was not moot and the 6th Circuit Court of Appeals correctly affirmed the District Court's decision.

2. Petitioner also asserts that the District Court lacked Article III jurisdiction upon the issuance of a dismissal entry dismissing the case with prejudice despite the express retention of jurisdiction over the terms of the settlement agreement. Respondents assert that the District Court acted in conformity with this Court's holding in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994) and the clear guidance reflected in the opinions dicta. Likewise, the decision of the 6th Circuit was in conformity with *Kokkonen* though Petitioner never raised the issue before the 6th Circuit Court of Appeals.

PARTIES TO THE PROCEEDING

Respondents Catherine Bosley and Richard Brown were plaintiff-appellees. As husband and wife, Catherine Bosley and Richard Brown, will hereinafter be referred to as Respondent.

Petitioner WFMJ Television, Inc. was a defendant in the lower court and appellant in the 6th Circuit Court of Appeals, along with John Urchak and Michelle Nicks. Though Mr. Urchak and Ms. Nicks are Respondents they are not represented by undersigned counsel nor are their positions advocated herein.

CORPORATE DISCLOSURE STATEMENT

Respondent (Catherine Bosley and Richard Brown) are individuals and therefore no publicly held corporations are implicated.

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RESPONDENT'S PRELIMINARY STATEMENT

Despite the Petitioner's summary of the history of the changing roles of the federal judiciary, the public policy in favor of settlements of cases without litigation remains strong. *See Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976), *cert. denied*, 429 U.S. 862, 97 S. Ct. 165, 50 L. Ed. 2d 140 (1976). What is plainly apparent, is that the District Court's decision confirming the Magistrate Judge's decision to enforce the settlement between the Petitioner and Respondent vindicated this public policy. The 6th Circuit Court of Appeals validated the District Court's conclusions by affirming the lower court's decision and recognizing that the Petitioner's efforts to continue and prolong this litigation were unavailing.

The Petition filed by WFMJ herein is simply the last "Hail Mary" in a string of futile attempts to prolong litigation, which WFMJ had settled some 26 months ago.

The litigation strategy of the Petitioner has been nothing short of frivolous. In the words of the 6th Circuit Court of Appeals, the arguments submitted by the Petitioner in the lower court level were both "meritless" and pure "conjecture."[1] The Court of

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[1] Opinion of the 6th Circuit Court of Appeals, Petitioner's Appendix at pp. 13a and 18a, respectively (hereinafter "Petitioner's App. at p. ___").

Appeals likewise referred to some arguments raised by the Petitioner as "untenable."[2]

Like the briefing both before the District Court and the Court of Appeals, the briefing submitted to this Court in WFMJ's Petition borders on sanctionable.

Petitioner has misrepresented the record and, most importantly, misrepresented its own conduct. Indeed, on at least three separate occasions, Petitioner stated to this Court that the Respondent unilaterally withdrew their Motion to Enforce the Settlement and that WFMJ did not "oppose." This position is nothing more than fiction.

On January 30, 2006, Petitioner filed a "Brief Concerning Whether a Settlement Was Achieved."[3] In this Brief, which was filed in the District Court, WFMJ advised the District Court that it "object[ed] to Plaintiffs' attempt to withdraw their Motion to Enforce what they claim is a valid settlement."[4] Petitioner expressed concern that the Plaintiffs would move to enforce the alleged agreement at any time "within the multi-year statute of limitations."[5] As such, the Petitioner asked the District Court to either conduct an "evidentiary hearing, or engage in a

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[2] Petitioner's App. at p. 13a.

[3] Respondent's Appendix at p. 1 (hereinafter "Respondent's App. at p. ___).

[4] Respondent's App. at p. 2.

[5] Respondent's App. at p. 2.

colloquy with Plaintiffs to ensure that by withdrawing their attempt at enforcement, they are knowingly and voluntarily relinquishing irrevocably their right to do so."[6]

In that same filing, Petitioner also provided what it considered to be the applicable legal framework, indicating that the Plaintiffs could not simply withdraw their Motion to Enforce, but rather, it was a motion which the Court needed to either grant or deny. The Petitioner framed the issue for the Court to decide post-settlement. The District Court subsequently granted an evidentiary hearing (as requested by the Petitioner) and concluded that a settlement had been achieved and found the Petitioner's position untenable.

Thereafter, Petitioner appealed to the 6th Circuit Court of Appeals, raising issues relating to the denial of various summary judgment motions, the denial of various motions for recusal, and issues pertaining to mootness. Not once did Petitioner raise the current challenge to the Article III jurisdiction of the District Court raised in the 2nd Question for review.

The conduct of the Petitioner cannot be condoned. This Petition should be denied, and this litigation should be brought to a well-deserved conclusion.

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[6] Respondent's App. at p. 2.

STATEMENT OF THE CASE

A. Background

This litigation stemmed from the appalling conduct of WFMJ and its agents in editing and disseminating excerpts from a video title "Spring Break 2003," where Respondent had appeared in a wet t-shirt contest. Following litigation surrounding the production of the original "Spring Break 2003," Plaintiffs acquired the copyrights to these images in an attempt to prevent further dissemination of this material.

After Petitioner's deplorable conduct of distributing these copyrighted images, Respondent initiated this litigation on December 23, 2004. The litigation was, to say the least, contentious. WFMJ and the other defendants jointly, and individually, filed motions to dismiss and motions for summary judgment (which were denied) and, throughout discovery, opposed the production of documents and witnesses, resulting in motions for protective orders, motions to compel, and evidentiary hearings before the magistrate judge. Defendants even sought to depose counsel for Respondent during the course of discovery.

All told, from the date of filing of the Complaint to the date that Petitioner's counsel filed his "Settlement Notice," there were 328 filings with the Court. The Defendants initiated at least 200 of these filings. Thus, when Petitioner notified the District Court that the case had settled, it was reasonable to assume that Petitioner had wearied of the litigation and was

content to bring it to an end. Nothing could have been further from the truth.

B. The Settlement and the Litigation that Follows

On November 23, 2005, following negotiations between Andrew Kabat, on behalf of Respondent, and Stephen Bolton, on behalf of Petitioner, the parties reached a settlement. This settlement was achieved by telephone.

On November 25, 2005, counsel for the Petitioner, David Marburger (an individual who did not participate in the final negotiations between Mr. Kabat and Mr. Bolton), notified the District Court that the case had settled. His "Settlement Notice" read:

> Defendants, WFMJ Television, Inc., Michelle Nicks, and John Urchak, hereby notify the Court that they have effectively reached a settlement with the Plaintiffs. The documents consummating the settlement are being drafted now. They have not yet been circulated, or (obviously) signed. Accordingly, there is no need to impanel a jury for trial on Monday, November 28, 2005.[7]

Petitioner did not advise the District Court that the parties were approaching a settlement, that the

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[7] *See* Petitioner's App. at pp. 45a-47a.

case had almost settled, or that a settlement was imminent or contingent on further negotiations. Rather, the Petitioner advised the Court that the case had, in fact, settled. Indeed, it was Petitioner's counsel, Mr. Marburger, who unilaterally notified the Court that the case had settled. Respondent was unaware of his intent to do so.

Relying upon the representation of Mr. Marburger, the District Court issued an Order on November 26, 2005. This Order read as follows:

> Upon representation of counsel that the above-captioned case has been settled between the parties, it is Ordered that the docket be marked, "Settled and Dismissed with Prejudice."
>
> Any subsequent Orders setting forth different terms and conditions relative to the settlement and dismissal of the within action shall supersede the within Order.
>
> Further, the Court retains continuing jurisdiction to resolve disputes concerning the memorialization of this Settlement Agreement. *See Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994).

Through its Order, the District Court did two things: (1) it expressly indicated that a subsequent order setting forth different terms and conditions relative to the settlement and dismissal would supersede the Order issued on November 26, 2005; and (2) it expressly indicated that it was retaining

jurisdiction over the Settlement Agreement to resolve disputes pursuant to this Court's Decision in *Kokkonen v. Guardian Life Insurance Co.* Neither Petitioner or Respondent objected to the Court's retention of Jurisdiction.

Thereafter, Petitioner, through Attorney Marburger, submitted a proposed Settlement Agreement that did not reflect the discussions of Mr. Kabat and Mr. Bolton. It was much broader than the parties had agreed and finalization of the written agreement broke down. On December 15, 2005, Plaintiffs filed a Motion to Enforce the Settlement Agreement. The next day, the Petitioner filed an Opposition to the Motion to Enforce the Settlement Agreement and specifically asked for an evidentiary hearing in a separate motion filed with the Court.[8] On January 19, 2006, the Plaintiffs filed a "Notice of Withdrawal of Motion to Enforce Settlement Agreement reached on November 23, 2005." The docket shows that this was filed in error and should have been filed as a motion. As such, the following day, the same document was filed as a "Motion to Withdrawal [sic] Document Motion to Enforce Settlement Agreement." Thus, as of January 20, 2006, there was a pending Motion to Withdraw the Motion to Enforce the Settlement Agreement. However, part and parcel with the "Motion to Withdraw the Motion to Enforce the Settlement Agreement" was another motion filed on January 19, 2006, captioned a "Motion to Vacate the

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[8] Respondent's App. at pp. 9-14.

Dismissal Entry and a Request for a New Trial Date." These Motions remained pending before the Court until such time as the Court resolved the issue of whether a settlement had been achieved.

Consistent with the notion that a controversy still existed, as previously referenced, Petitioner filed its "Brief Concerning Whether a Settlement Was Achieved" on January 30, 2006. An evidentiary hearing was held on January 30, 2006. All parties participated.

Thereafter, Respondent filed a "Brief in Support of the Motion to Enforce Settlement" on February 3, 2006, which further supported the notion that the parties were fully engaged in a dispute over whether a settlement agreement had been achieved (as opposed to merely seeking to vacate the Court's dismissal entry).

On February 13, 2006, Petitioner filed a post-brief and "closing argument." Petitioner even filed an Amended or Substituted Brief on February 15, 2006. At no time did Petitioner assert that the Court lacked Article III jurisdiction to resolve the dispute over the settlement agreement. Petitioner also did not question whether the Court had effectively retained jurisdiction over this dispute. Instead, both Petitioner and Respondent had expressly participated in the process of determining the terms of the settlement agreement.

On February 24, 2006, the Magistrate Judge issued a Report and Recommendation recommending that the Court grant Plaintiffs' Motion to Enforce the

Settlement Agreement and deny Plaintiffs' Motion to Vacate the Order of Settlement. The Magistrate also recommended that the Court deny Plaintiffs' Motion to Withdraw their Motion to Enforce the Settlement Agreement and to find that the parties had agreed to an oral settlement agreement under the terms outlined in the Report and Recommendation. On February 27, 2006, Petitioner filed a Notice of Intent to File Objections to the Magistrate Report, but then failed to timely file their objections.[9] Despite numerous opportunities to raise issues concerning the "Mootness" doctrine or questioning the Court's Article III jurisdiction, Petitioner never asserted these issues in front of the District Court. Rather, Petitioner and the Respondent litigated issues on the subject of the Motion to Enforce the Settlement with vigor.

After the District Court adopted the Magistrate Judge's Report and Recommendation concluding that a settlement had been achieved, the Petitioner took a new tack – it decided to attack the credibility and impartiality of the Magistrate Judge and the District Judge. Thereafter, Petitioner raised, for the first time, concerns that the Court had prejudged the settlement issue. Thus, the Petitioner moved to

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[9] This was a common practice of Petitioner in the District Court. Petitioner missed deadlines and/or filed pleadings late on at least 30 occasions during the pendency of the matter in front of the District Court.

recuse the District Judge, not once, but twice. Notably, however, in Petitioner's Motion to Recuse, it also did not address any purported lack of jurisdiction or the mootness doctrine. Rather, Petitioner simply sought a different Judge to address the issue of the validity of the settlement.

Following the District Court's denial of the Motion to Recuse and affirmation of the Report and Recommendation, the District Court entered a new judgment entry, which found that the case had settled and set forth the terms, thus superseding its Dismissal Entry of November 26, 2005.

Thereafter, Petitioner took an appeal to the 6th Circuit Court of Appeals, and while raising for the first time the issue of mootness, the Petitioner never challenged the Article III jurisdiction of the District Court on the basis of *Kokkonen*. To the contrary, they expressly acknowledged the right of the Court to retain ancillary jurisdiction over the issue of settlement and cited *Kokkonen* as the authority for that proposition.[10]

The 6th Circuit Court of Appeals affirmed the reasoning of the Magistrate Judge and the District Judge below and found that a settlement had been achieved. The Court further found that the mootness doctrine did not apply because there clearly was a

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[10] Petitioner/Appellant Brief to the 6th Circuit Court of Appeals at p. 31.

case in controversy as the parties contentiously litigated the issue of settlement after the purported Notice of Withdrawal of the Motion to Enforce Settlement for 15 more months.

Now, after submitting literally hundreds of pages of briefing on the issue of whether summary judgment should have been granted, whether the trial court should have recused itself, and whether settlement was achieved, Petitioner asserts for the first time that Article III jurisdiction was destroyed upon the issuance of a dismissal entry with prejudice by the Court despite its obvious intent to retain jurisdiction to resolve issues over the settlement, which was itself communicated by Petitioner's own counsel. This Court should not condone such conduct and the Petition for a Writ of Certiorari of WFMJ should be denied.

REASONS FOR DENYING THE PETITION

The Petitioner argues that this Court should grant its Petition for Certiorari "to resolve the continuing confusion among the lower federal courts arising from *Kokkonen's* dicta. . . ."[11] However, the assertion of confusion is grossly overstated. Since this Court's decision in *Kokkonen*, the District Courts and the Appellate Courts have consistently interpreted *Kokkonen* as permitting the retention of limited,

[11] *See* Petition for Writ of Certiorari at p. 25.

ancillary jurisdiction to enforce settlement agreements when the District Court either (1) incorporates the terms of the agreement into its order of dismissal; or (2) when the Court in its order states that it is "retaining jurisdiction" over the settlement agreement. *See Kokkonen*, 511 U.S. at 381.

Here, the Court expressly retained jurisdiction over the settlement agreement and preserved its ancillary jurisdiction to enforce the agreement.

I. The 6th Circuit Correctly Concluded That The Issue Was Not Moot And That An Issue In Controversy Still Existed

The Petitioner argues that the "Notice of Withdrawal of Plaintiffs' Motion to Enforce Settlement Agreement" divested the Court of Article III jurisdiction as the issue was moot and no controversy existed. However, that is not the position that the Petitioner expressly took with the District Court.

On January 30, 2006, the same day that Magistrate Judge Limbert conducted an evidentiary hearing on the issue of whether a settlement had been achieved, the Petitioner chimed-in and submitted briefing on the issue of whether the issue was moot. Indeed, in its "Brief Concerning Whether a Settlement Was Achieved," Petitioner advised the District Court that WFMJ "object[ed] to Plaintiffs' attempt to withdraw their motion to enforce what they claim is a

valid settlement."[12] It informed the District Court that its position was that the Court "should either require an evidentiary hearing, or engage in a colloquy with Plaintiffs to insure that they understand that, by withdrawing their attempt at enforcement, they are knowingly and voluntarily relinquishing irrevocably their right to do so."[13] Petitioner also cited to cases which supposedly stood for the proposition that Plaintiffs could not unilaterally withdraw their motion to enforce the settlement.[14] Petitioner further expressed concern that the Plaintiffs were merely "tabling" their motion for assertion at a later time and asserted to the District Court that:

> . . . Plaintiffs either believe they have a valid claim [to enforce settlement] or they are subject to sanctions. *See, generally*, Fed. Civ. R. Proc 11. If they believe the claim is valid, Plaintiffs should be required to have the Court resolve, as a matter of law, whether

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[12] Respondent's App. at p. 2.

[13] Respondent's App. at p. 2.

[14] *See* Respondent's App. at pp. 2-3, citing C.J.S., *Motions* §41 ["a motion may not be withdrawn after submission without the consent of the court, which ordinarily will not be given over the objection of the opposing party"]; *Robinson v. Worthington*, 544 F. Supp. 956, 963 (M.D. Ala. 1982) [Petitioner asserted that the case stood for the proposition that "the Federal Rules of Civil Procedure do not afford a litigant a right to withdraw a motion once it is filed with the Court"]; *In re White Farm Equipment*, 23 B.R. 85, 93(Bankr. N.D. Ohio 1982) [Petitioner writes: "'purported withdrawal' of a motion a 'nullity'."].

> there is such a valid claim before the Defendants are compelled to go to the remarkable expense of firing back up for trial.[15]

After the purported Notice of Withdrawal, Defendants filed a total of twenty-eight (28) Briefs and/or Notices with the Court. None challenged the issue of whether the Court had the authority to enforce the settlement agreement.

The District Court did exactly what the Petitioner asked. The Magistrate Judge conducted an evidentiary hearing, entertained hundreds of pages of briefing, and issued a Report and Recommendation, which happened to conflict with Petitioner's view of the settlement. Thereafter, the Petitioner (albeit in an untimely manner) attacked that decision and urged the District Judge to reach a different result. However, that did not happen.

Now, in the midst of a new-found argument, Petitioner asserts that the Court lacked jurisdiction upon the filing of the "Notice of Withdrawal." Notably, however, Petitioner actually referred to the "Notice of Withdrawal" as a "nullity" in its "Brief Concerning Whether a Settlement Was Achieved." True to form, since that argument did not work, Petitioner has decided to recast its position and take a diametrically opposite stance before this Court.

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[15] Respondent's App. at p. 5.

Further, the Petitioner continued reliance on the *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998) decision is misplaced and certainly does not warrant granting the petition for certiorari herein. First, *Earth Island* does not involve the enforcement of a settlement agreement, the retention of ancillary jurisdiction, or implicate the *Kokkonen* decision. Instead, that case involved a question of whether to enforce revised regulations over a governmental entity after the case had been concluded. There was no live case or controversy at the time the motion to enforce was filed. There was no express retention of ancillary jurisdiction, nor did any party consider there to be a live dispute by the time the Court issued its ruling. The Court of Appeals stated: "Before [Plaintiffs] Motion to Enforce, the trial court had fully resolved the dispute and entered final judgment, thus extinguishing the entire controversy before it." *Id.* at 1356.

The same obviously cannot be said about this case. When Plaintiffs attempted to withdraw their Motion to Enforce Settlement, the Notice was re-characterized as a Motion. The Petitioner then opposed the Respondent's right to withdraw the Motion, demanding a hearing, arguing its position on the issue of settlement, and advocating for the Court to adopt its version of the scope of settlement, or alternatively, to conclude that no settlement had been reached. There clearly was something for the District Court to resolve.

Finally, the District Court did not exceed its jurisdiction – it resolved a dispute concerning the memorialization of a settlement agreement – an issue expressly reserved by the Court to resolve in its Order of Dismissal. Indeed, the 6th Circuit Court of Appeals previously noted the distinction between this case and *Earth Island* and rejected Petitioner's argument.

II. Contrary To The Position Of Petitioner, There Is No Confusion In The Lower Courts On How To Apply *Kokkonen*

The unanimous opinion in *Kokkonen* is not confusing, and has not resulted in inconsistent interpretation. As Justice Scalia wrote in *Kokkonen*,

> the situation would be quite different if the parties' obligations to comply with the terms of the settlement agreement had been part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.

Kokkonen, 511 U.S. at 381.

In the present case, this is not a dismissal pursuant to Fed. R. Civ. Proc. 41(a)(1) as the Plaintiffs did not stipulate to the dismissal. Rather, the dismissal was, implicitly, pursuant to Fed. R. Civ. Proc. 41(a)(2) in that the Court dismissed the matter *sua sponte* upon notice from the Petitioner that the case had

been settled. The Court then attached conditions to the dismissal entry, which retained jurisdiction with the Court to issue a superseding order with additional terms and conditions to resolve disputes over the memorializing of the settlement agreement.

The Petitioner refers to the "disarray" in the lower courts but fails to identify how courts are interpreting *Kokkonen* inconsistently. In suggesting that the 7th Circuit has interpreted *Kokkonen* differently, the Petitioner ignores the consistency with which *Kokkonen* has been applied by the 7th Circuit, and even by Judge Posner.

For example, *In re VMS Securities Litig. v. Prudential Securities, Inc.*, the 7th Circuit, following *Kokkonen*, concluded that the District Court "need not use 'any magic form of words' to retain jurisdiction – [a]ll that is necessary is that it be possible to infer that [the court] did intend to retain jurisdiction." *In re VMS Securities Litig. v. Prudential Securities, Inc.*, 172 F.3d 1372, 1322 (7th Cir. 1996). In the 13 plus years since *Kokkonen*, one judge, Judge Posner, has concluded that the Court may not retain jurisdiction over a matter which is dismissed with prejudice, even if the retention was to enforce settlement agreement pursuant to an express retention of jurisdiction under *Kokkonen*. *See Lynch v. Samatamason*, 279 F.3d 487, 489 (7th Cir. 2002). However, the language in *Lynch* relied upon by Petitioner is merely *dicta* and of no significance to the actual holding rendered by Judge Posner. In *Lynch*, the District Judge found that a valid settlement had

been reached between the parties. Based upon the settlement the District Court dismissed the case with prejudice and retained jurisdiction to enforce the settlement. Judge Posner commented that the retention of jurisdiction was of no effect because the case had been dismissed. However, such comment was superfluous to the Court's affirmation of the District Court's decision finding a settlement and dismissing the case.

Four years later in *Shapo v. Engle*, 463 F.3d 641, 643 (7th Cir. 2006), Judge Posner again addressed the issue of enforcement of a settlement agreement, following a dismissal with prejudice. Rather than adopt the principle advocated herein by Petitioner, Judge Posner gave lip service to the concern that the dismissal with prejudice divested the court of jurisdiction, but then concluded that the District Court "appears from the judgment order itself . . . to retain jurisdiction until the settlement – incomplete at the time that the order was made – was fully implemented . . . " *Shapo,* 463 F.3d at 643. The Court then remanded the case to the District Court to "clarify the judgment" to determine if a "Master Pay Agreement" was part of the settlement. If the dismissal with prejudice had divested the Court of jurisdiction (as the Petitioner suggests), there would have been nothing for the Court to clarify.

Other panels of the 7th Circuit have reiterated a view consistent with the 6th Circuit herein, that "the doctrine of ancillary jurisdiction confers federal jurisdiction over a case outside federal jurisdiction in which the Plaintiffs seek to enforce a settlement

agreement, as long as the district court . . . retained jurisdiction to enforce the terms of the agreement." *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000) [Court found ancillary jurisdiction to exist for action to enforce settlement agreement removed from state court to federal court after "final" judgment following settlement of class action suit in Federal Court where court retained the jurisdiction to enforce the settlement agreement].

Finally, what is abundantly clear, is that the lower courts interpret the *Kokkonen* decision on a case-by-case basis because of the underlying facts and circumstances of the settlement and judgment entry of the Court – not because of any disarray or confusion by the lower courts as to the manner in which *Kokkonen* should be interpreted.

CONCLUSION

Based upon the foregoing, this Court should deny the Petition for Certiorari filed by Petitioner.

Respectfully submitted,

RICHARD C. HABER, ESQ.
Counsel of Record
HABER POLK, LLP
1111 Superior Avenue, Suite 620
Cleveland, Ohio 44114
(216) 241-0700
Counsel for Respondents,
Catherine Bosley and
Richard Brown

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CATHERINE BOSLEY, *et al.*, Plaintiffs	Case No. 4:04cv2529
	Judge James Gwin
	Mag. Judge George J. Limbert
vs.	(Filed Jan. 30, 2006)
21 WFMJ TV, *et al.*, Defendants	

BRIEF CONCERNING HEARING ON WHETHER A SETTLEMENT WAS ACHIEVED SUBMITTED BY WFMJ

COMES NOW THE DEFENDANT, WFMJ TV, through counsel who has entered a limited appearance for purpose of litigating the hearing on Plaintiffs' motion to enforce a claimed settlement agreement, and submits the following Memorandum relative to the issues which might arise at the January 30, 2006 hearing.

I

WFMJ's position continues to be the only one compelled by the facts that occurred, and the law applicable to those facts. The abridged cell phone discussions between Plaintiffs' counsel and Defendants' counsel while the latter drove home through a snowstorm on Thanksgiving Eve did not form a

complete or valid settlement contract that is enforceable by specific performance.

WFMJ objects to Plaintiffs' attempt to withdraw their motion to enforce what they claim is a valid settlement. Plaintiffs' withdrawal is not predicated on any reconsideration of the validity of the contract: they continue to insist that the contract exists. Implicit in their attempt to withdraw their previous efforts to enforce the agreement is the notion that Plaintiffs may move to enforce the alleged agreement at any time within the multi-year statute of limitations. Thus, this Court should either require an evidentiary hearing, or engage in a colloquy with Plaintiffs to insure that they understand that by withdrawing their attempt at enforcement they are knowingly and voluntarily relinquishing irrevocably their right to do so. WFMJ also wishes to supply the proper legal framework upon which the issue os to be decided.

II

This Court's ruling was proper that Plaintiffs' may not withdraw their motion to enforce settlement. Generally, "a motion may not be withdrawn after submission without the consent of the court, which ordinarily will not be given over the objection of the opposing party." See, C.J.S., *Motions* § 41. The Federal Rules of Civil Procedure do not afford a litigant a right to withdraw a motion once it is filed with the court. See, *Robinson v. Worthington,* 544 F.Supp. 956,

963 (M.D. Ala. 1982). In *Robinson,* the district court denied a party permission to withdraw a summary judgment motion when the opposing party had already filed an opposition and the motion had been pending for an extended period of time. 544 F.Supp., at 964-65. The court also considered the prejudice to the adverse party and whether the withdrawal would "help resolve the litigation at an early date." *Robinson,* 544 F.Supp., at 965.

The Bankruptcy Court of this district has ruled that a plaintiffs' "purported withdrawal" of a motion was a "nullity." *In re White Farm Equip. Co.,* 23 B.R. 85, 93 (Bankr. N.D. Ohio 1982), summary judgment reversed on other grounds, 23 B.R. 85 (N.D. Ohio 1984). The court cited state court law that provides that "after a motion is submitted, by making oral argument thereon or the filing of moving papers, it may not be withdrawn in the absence of consent of all parties or leave of court." See, *White Farms, supra,* 23 B.R. at 93. The court refused to withdraw the motion:

> In the instant proceeding, counsel for Plaintiffs presumes that he may file a motion with the Court, have it pre-tried, argue it at great length, and then, after sensing that the Court considers it disfavorably, notice a withdrawal of it without procuring nor even seeking either the consent of the parties or leave of the court. Such disorderly practice not only is an affront to the Court but, if sanctioned, would play havoc with motion practice for the most obvious of reasons: motions

> would take on an ephemeral character at the with and caprice of the movant.

Id., 23 B.R. at 93. A similar result occurred in a patent case, where the party moved for dismissal on the grounds of lack of personal jurisdiction, and then attempted to withdraw the motion. See, *Safer Display Technologies, Ltd. v. Tatung Co.*, 227 F.R.D. 435, 441 (E.D. Vir. 2004). The court ruled that it would not "allow a situation to occur where jurisdictional discovery is short-circuited, the merits are fully litigated, and the defense is later reasserted on appeal without a sufficient factual record from which the issue can be resolved. Allowing such a chain of events to unfold would waste precious judicial resources and result in a *miscarriage* of justice." *Id.*, 227 F.R.D., at 442.

Here, in their papers seeking to withdraw their motion to enforce the alleged settlement contract, Plaintiffs continue to insist that they have contractually released the WFMJ defendants from liability. Merely "tabling" their motion to enforce has the immediate effect of propelling the defendants to go to the substantial expense of gearing back up for trial. While that is the expected result when there is no settlement, WFMJ's concern here is what WFMJ expects is the concern of the Court: that Plaintiffs' "disorderly practice" of giving a notice of withdrawal, without procuring or seeking the consent of the parties and leave of the Court "is an affront to the Court" and converts motions into filings of "ephemeral character," the life of which is determined by the

"caprice of the movant." See, *White Farms, supra,* 23 B.R. at 93. WFMJ's additional concern is that Plaintiffs will renew their efforts at specific performance at some point after the Defendants have spent more time and money in preparing for or going to trial. Plaintiffs are attempting, *sub silentio,* to hold onto their contract claim while proceeding to trial, thus effectively *making* WFMJ an insurer against a bad trial result.

The Plaintiffs either believe they have a valid claim or they are subject to sanctions. *See, generally,* FED R. CIV. PROC. 11. If they believe the claim is valid, Plaintiffs should be required to have the Court resolve, as a matter of law, whether there is such a valid claim before the Defendants are compelled to go to the remarkable expense of firing back up for trial. If Plaintiffs continue to insist that they do not want to go forward with their contract enforcement claim "at this time," the Court should rule either that the Plaintiffs have waived their right to proceed on their contract claim; or, that they have no contract as a matter of law because they have defaulted on their burden to demonstrate the existence of a settlement contract by clear and convincing evidence, despite being given the opportunity to demonstrate its existence.

III

As to the merits of the claim itself, there is no settlement. This is not to say that there were not

settlement discussions, nor is it to say that they were not fruitful in that substantial progress was made. But a desire to settle a case and good faith efforts to settle a case cannot supplant what actually occurred. Nor can a desire to settle a case and good faith efforts to settle a case change the applicable law.

State contract law governs whether litigants have formed a binding settlement contract. *See, e.g., Hageman v. Signal L.P. Gas, Inc.,* 486 F.2d 479, 487 (6th Cir. 1973). Plaintiffs bear the burden of establishing the existence of an settlement agreement, as they are the parties *claiming* its existence. *See, Nilavar v. Osborn,* 127 Ohio App.3d 1, 11, 711 N.E.2d 726, 732 (1998). Where the discussions among counsel were outside of the court's presence and supervision, the party seeking judicial enforcement must establish by clear and convincing evidence that the discussions reached the stage of creating an enforceable settlement contract that resolves all issues. See, *Anschutz v. Radiology Assocs. of Mansfield, Inc.,* 827 F. Supp. 1338, 1344 (N.D. Ohio 1993).

The Ohio Supreme Court has ruled that "courts should be particularly reluctant to enforce ambiguous or incomplete contracts that aim to memorialize a settlement agreement between adversarial litigants." See, *Rulli v. Fan Co.,* 79 Ohio St. 3d 374, 377, 683 N.E.2d 337, 339 (1997). Indeed, "[w]here parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties." *Id.,* 79 Ohio St. 3d at 377, 683 N.E.2d at 339. Ohio's highest court explained that to force an

agreement upon the parties where one does not exist "would be to deny the parties' right to control the litigation, and to . . . adopt . . . the interpretation of one party, rather than enter judgment based upon a mutual agreement." See, *Rulli,* 79 Ohio St. 3d, at 377, 683 N.E.2d, at 339. Even where terms of a claimed settlement contract appear at first blush to be reasonably clear, where the litigants interpret those terms differently, there may be no enforceable settlement contract. *Id.,* 79 Ohio St. 3d, at 377, 683 N.E.3d at 339.

Applying these standards, the evidence will demonstrate quite clearly that while the parties made substantial progress on November 23, 2005, coming to agreement on the one term that had so long been the sole issue of negotiation and so hotly contested, that agreement and general discussions do not a settlement agreement make, no matter how badly anyone wants it to be.

Respectfully submitted,

/s/ *John B. Juhasz*
JOHN B. JUHASZ (Ohio Reg. 0023777)
7330 Market Street
Youngstown, Ohio 44512-5610
Telephone: 330.758-2308
Facsimile: 330.758.8290
COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed on January 30, 2006 utilizing the Court's CM-ECF system. The system will electronically send copies to all counsel of record. Parties may access this filing by using the Courts CM-ECF system.

/s/ *John B. Juhasz*
JOHN B. JUHASZ

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CATHERINE BOSLEY, RICHARD BROWN, Plaintiffs, vs. WFMJ TELEVISION, INC., *et al.*, Defendants.	CASE NO.: 4:04-CV-02529 JUDGE JAMES S. GWIN **Motion Of Defendant WFMJ Television, Inc. For Evidentiary Hearing To Resolve Disputed Facts As To Whether The November 23, 2005, Thanksgiving Eve Cell Phone Conversation Between Defense Counsel Stephen Bolton and Plaintiffs' Counsel Andrew Kabat Constitutes A Contract Finally Resolving All Settlement Terms** (Filed Dec. 16, 2005)

Defendant WFMJ Television, Inc. hereby moves for an evidentiary hearing to determine whether there is a final and complete settlement contract between defendants and plaintiffs Catherine Bosley and Richard Brown or, in the alternative, requests that this Court summarily deny plaintiffs' motion to enforce settlement. WFMJ denies various facts attested by Bosley's counsel in Bosley's Motion to Enforce Settlement, and denies that a single cell phone

conversation on the eve of Thanksgiving between Andrew Kabat and Stephen Bolton constituted the entire settlement agreement.

A memorandum in support and a declaration of Stephen Bolton are attached and are incorporated by reference.

/s/ Aaron J. Rupert
David L. Marburger (0025747)
James Wooley (0033850)
Aaron J. Rupert (0075643)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
E-mail: dmarburger@bakerlaw.com
E-mail: arupert@bakerlaw.com

Stephen T. Bolton, Esq. (0010994)
Manchester, Bennett, Powers & Ullman
Atrium Level Two
The Commerce Building
201 East Commerce Street
Youngstown, Ohio 44503
Telephone: (330) 743-1171
Facsimile: (330) 743-1190
Attorneys for Defendants WFMJ Television, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically on December 16, 2005, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for plaintiffs, Andrew A. Kabat and Shannon J. Polk, Reminger & Reminger Co. L.P.A., 1400 Midland Building, 101 Prospect Avenue West, Cleveland, Ohio 44115.

/s/ Aaron J. Rupert
Aaron J. Rupert

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CATHERINE BOSLEY, RICHARD BROWN, Plaintiffs, vs. WFMJ TELEVISION, INC., *et al.*, Defendants.	CASE NO.: 4:04-CV-02529 JUDGE JAMES S. GWIN **Memorandum in Support of Motion Of Defendant WFMJ Television, Inc. For Evidentiary Hearing To Resolve Disputed Facts As To Whether The November 23, 2005, Thanksgiving Eve Cell Phone Conversation Between Defense Counsel Stephen Bolton and Plaintiffs' Counsel Andrew Kabat Constitutes A Contract Finally Resolving All Settlement Terms** (Filed Dec. 16, 2005)

On November 23, 2005, the night before Thanksgiving, while counsel for WFMJ Television, Inc., Stephen Bolton, was driving to Youngstown through a blizzard, he had a cell phone conversation with counsel for plaintiffs, Andrew Kabat. WFMJ denies that the parties reached and agreed on all material terms

of a final settlement contract during that conversation.

"[W]here material facts concerning the existence of an agreement to settle are in dispute, the entry of an order enforcing a settlement agreement without a plenary hearing is improper." *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 622 (6th Cir. 1973). *See also Re/Max Intern., Inc. v. Realty One, Inc.*, 271 F.3d 633, 646 (6th Cir. 2001) ("an evidentiary hearing is required where facts material to an agreement are disputed"); *Aro Corp v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976) ("an evidentiary hearing should be held when a substantial factual dispute exists" about the material terms of a settlement agreement); *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 377, 683 N.E.2d 337, 339 (Ohio 1997) ("[g]iven the lack of finality and the dispute that evolved subsequent to the initial settlement hearing, we hold that the trial judge should have conducted an evidentiary hearing to resolve the parties' dispute about the existence of an agreement or the meaning of its terms"); *Tabbaa v. Koglman,* 777 N.E.2d 338, 342, 149 Ohio App.3d 373, 379 (Ohio App. 2002) ("the trial court is required to hold an evidentiary hearing when the party opposing the agreement alleges . . . any other factual dispute concerning the existence of the terms of a settlement agreement").

WFMJ denies that a single cell phone conversation on Thanksgiving eve between Stephen Bolton and Andrew Kabat constitutes a final and complete settlement agreement comprised of only the literal

words uttered over the phone. Stephen Bolton's declaration submitted with this memorandum attests to genuine and material factual disputes between WFMJ and Bosley that necessitates an evidentiary hearing if the Court does not summarily deny plaintiffs' motion to enforce the alleged settlement agreement.

Respectfully submitted,

/s/ Aaron J. Rupert
David L. Marburger (0025747)
James Wooley (0033850)
Aaron J. Rupert (0075643)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East 9th Street
Cleveland, Ohio 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
E-mail: dmarburger@bakerlaw.com
E-mail: arupert@bakerlaw.com

Stephen T. Bolton, Esq. (0010994)
Manchester, Bennett, Powers & Ullman
Atrium Level Two
The Commerce Building
201 East Commerce Street
Youngstown, Ohio 44503
Telephone: (330) 743-1171
Facsimile: (330) 743-1190
Attorneys for Defendants WFMJ Television, Inc.

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No. 07-716

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

WFMJ TELEVISION, INC.,
Petitioner,

v.

CATHERINE BOSLEY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

DAVID L. MARBURGER
Counsel of Record
MATTHEW J. CAVANAGH
BAKER & HOSTETLER LLP
3200 NATIONAL CITY CENTER
1900 EAST NINTH STREET
CLEVELAND, OHIO 44114
(216) 621-0200

Counsel for Petitioner

February 22, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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Petitioner WFMJ's reply in support of petition for writ of certiorari

I. The questions presented have national and potentially permanent impact on the evolving power of federal district courts to compel civil parties to settle.

Respondent Bosley has offered nothing to diminish the importance of the questions presented here.

She does not deny, as no one can, the increasing pressure in federal district courts to settle civil cases. Nor does she dispute that the judicial zeal to settle cases presents special challenges in demarking bounds of federal judicial power.

She avoids tackling the question of whether a district court has the power to do what happened here. The court here purported to exercise ancillary jurisdiction to enforce an asserted state-law settlement contract between parties of the same state. It based its power to do that on a bare recital of "continuing jurisdiction" to resove settlment disputes, while *sua sponte* dismissing the underlying federal-question suit with prejudice.

And the court entered its recital of "continuing" jurisdiction to enforce settlement (*i.e.*, never ending) without first confirming that an enforceable settlement contract actually existed; without knowing any of its terms; and without ordering any of the parties to comply with it.

This case illustrates vividly how uncertainties about ancillary jurisdiction to enforce settlement -- and perhaps eagerness to have it – can spawn standardless discretionary judicial acts that strain the limits of Article III.

II. WFMJ's petition is accurate.

Before going further, the reader should reject Bosley's accusation that petitioner WFMJ has misrepresented the record.[1] Her sole support for that charge: "Petitioner stated to this Court that the Respondent unilaterally withdrew their Motion to Enforce the Settlement and that WFMJ did not 'oppose.'"[2]

Bosley does not directly quote WFMJ's petition or offer any page cites, which may explain why she is mistaken.

What the petition describes as "unopposed" or that "WFMJ didn't oppose" is Bosley's motion to vacate the dismissal and to set the case for trial on the merits of her copyright claims. Thus:

- Bosley "moved to vacate the dismissal, and moved to set the case for trial. WFMJ didn't oppose."[3]

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[1] Bosley Brf., 2.

[2] Bosley Brf., 2.

[3] Petition, 1.

- "Later that day, she moved to vacate the *sua sponte* dismissal order and to set the case for trial. WFMJ didn't oppose."[4]

- "WFMJ contends that when Bosley unconditionally withdrew her settlement motion on January 19, and moved unopposed to vacate the dismissal order and to go to trial, …."[5]

The petition is accurate.

III. The Court should resolve the important disagreement between the Seventh and Sixth circuit courts of appeals.

The recent Seventh Circuit opinions cited in WFMJ's petition say that, where there is no consent decree, a district court cannot exercise self-invoked "continuing" jurisdiction to enforce settlement after terminating federal jurisdiction by dismissing the underlying suit with prejudice.

That conclusion contradicts the order that the Sixth Circuit affirmed here, a ruling required by the Sixth Circuit's earlier decision in Re/Max Internat'l, Inc. v. Realty One, Inc., 271 F.3d 633 (6th Cir. 2001), cert. denied, 535 U.S. 987 (2002).

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[4] Petition, 11.

[5] Petition, 23.

In Re/Max, the Sixth Circuit upheld a dismissal order nearly verbatim identical to the one contested here – and issued by the same district judge.

Although one judge dissented in Re/Max, he opined that the district judge "easily" could have invoked post-dismissal power to enforce settlement by adding some language, which the order at issue here contains.[6]

Bosley insists that the author of the contrary Seventh Circuit opinions – Judge Posner – is just "one judge," but she ignores the unanimity of the panels that adopted the opinions that Judge Posner wrote.

Citing two opinions written by other Seventh Circuit judges, Bosley claims that the other judges agree with the Sixth Circuit.[7] Both of the opinions that Bosley cites – one in 1996 and one in 2000 – pre-dated Judge Posner's opinions of 2007, 2006, and 2002.[8]

Judge Kanne wrote the 1996 opinion and judges Evans and Bauer were on the panel of the opinion issued in 2000. Each sat on at least one of the later

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[6] Re/Max, 271 F.3d 633, 653 (Wallace, J., dissenting).

[7] Bosley Brf., 17-19.

[8] See next footnote for citations.

Bosley relies on *In re VMS Securities Litig. v. Prudential Securities, Inc.*, 103 F.3d 1317 (7th Cir. 1996) – mistakenly cited by Bosley as 172 F.3d 1372 – and *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000).

panels that unanimously adopted Judge Posner's opinions.[9]

Bosley dismisses two of those unanimous opinions as dicta – Lynch, Inc. v. SamataMason, Inc. and Shapo v. Engle.[10]

Both opinions emphasized that district courts cannot validly assume ancillary jurisdiction to enforce settlement merely by saying that they have it, while dismissing the underlying federal suit with prejudice. Those conclusions were not dicta.

In Lynch, the Seventh Circuit viewed that conclusion as vital to its own jurisdiction to hear the appeal.[11] After invalidating the retained jurisdiction to enforce settlement, the court decided that the matter was "appealable now because it wound up the proceedings in the district court even though Lynch may face further litigation with SamataMason in another forum over the settlement agreement."[12]

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[9] *Dupuy v. McEwen*, 495 F.3d 807, 809 (7th Cir. 2007) (Posner, Easterbrook, Evans); *Shapo v. Engle*, 463 F.3d 641, 643 (7th Cir. 2006) (Posner, Coffey, Ripple); *Lynch v. SamataMason, Inc.*, 279 F.3d 487, 489 (7th Cir. 2002) (Posner, Easterbrook, Bauer); *Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (Posner, Easterbrook, Kanne).

[10] Bosley Brf, 17, 18. *Lynch*, 279 F.3d 487, 489 (7th Cir. 2002); *Shapo*, 463 F.3d 641, 643 (7th Cir. 2006).

[11] 279 F.3d 487, 490.

[12] *Lynch*, 279 F.3d at 490.

In Shapo, the Seventh Circuit remanded to clarify whether the district court's asserted power to enforce settlement came from an order dismissing the underlying suit with prejudice. That mattered because "we cannot exclude the possibility that the judge mistakenly thought she could retain jurisdiction even after dismissing the suit with prejudice."[13]

Yet uncertainty about federal jurisdiction does not arise only from holdings. It arises from dicta, too, with the Kokkonen dicta as a prime example.[14]

Although the difference between dicta and holdings is quite important in deciding which statements in appellate opinions bind courts in later cases, it does not negate dicta's pervading influence in producing uncertainty about what the law authorizes or requires.

Indeed, regardless of whether some lower court interpretations of Kokkonen's dicta are themselves dicta, the lower courts' opinions have caused disinterested and respected scholars to conclude that "many lower court judges disagree about what *Kokkonen* requires," resulting in "continuing uncertainties and confusion."[15]

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[13] 463 F.3d 641, 646.

[14] *Kokkonen v. Guardian Life. Ins. Co.*, 511 U.S. 375, 581-582 (1994).

[15] J. Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 635 (2005); J. Parness & M. Walker, *Enforcing Settlements in Federal Civil Actions*, 36 Indiana L. Rev. 33, 34 (2003).

IV. WFMJ raised its challenge to post-dismissal Kokkonen jurisdiction below.

Bosley insists that WFMJ did not question until now the district court's self-invoked jurisdiction under Kokkonen's dicta.[16] Again, Bosley is mistaken.

What actually happened was that WFMJ read Re/Max.

Although futile to assault the same order by the same judge already upheld in a recent published opinion by the same court of appeals, WFMJ still questioned the order's validity albeit less aggressively.

Mindful of Re/Max (and even a bit intimidated by it), WFMJ initially acknowledged in the court of appeals that the judge's order conferred the power that he had assumed.

But WFMJ protested that in a later appellate brief, and Bosley addressed the merits of WFMJ's protest in oral argument.[17]

Then, Bosley moved the court of appeals to award sanctions, arguing that WFMJ's legal arguments were frivolous. WFMJ then attacked the district court's Kokkonen jurisdiction again and more aggressively.[18]

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[16] *Kokkonen v Guardian Life Insur. Co.*, 511 U.S. 375, 381-382 (1994).

[17] Appdx to this brief, 4a–6a, 8a.

[18] Appdx to this brief, 10a-11a.

The Sixth Circuit denied Bosley's motion for sanctions, and added the unusual note of declining to award even ordinary court costs.[19]

This Court has not required petitioners to risk sanctions by mounting quixotic frontal assaults on recent and seemingly impenetrable circuit precedent as a condition for this Court's review, a condition that would impose an enormous gamble.[20]

That would seem to be especially true where, as here, the petitioner is challenging subject matter jurisdiction – which this Court can raise for the first time *sua sponte* and litigants can raise at any time.

V. Bosley did not refile her notice withdrawing the settlement motion as a "motion" to withdraw.

Bosley says that her notice withdrawing her motion to enforce settlement "was refiled as a motion

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[19] Appdx to this brief, 13a-15a.

[20] *See MedImmune, Inc. v. Genetech, Inc.*, 127 S.Ct. 764, 770 (2007) (not aggressively urging an argument that circuit precedent "precluded" did not suggest waiver, but instead reflected counsel's "sound assessment that the argument would be futile"); *United States v. Williams*, 504 U.S. 36, 43-45 (1992) (declining to require the government to "demand overruling of squarely applicable, recent circuit precedent" as condition for granting certiorari); *Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587-588 (1970) (Black, J., dissenting) (the Court considers "whether assertion of the issue earlier would have been futile" in the court below).

to withdraw."[21] Using passive voice, Bosley does not say that *she* converted the notice into a motion. Indeed she did not, as the next section of this reply will show.

The Sixth Circuit, however, put the matter to rest by concluding: "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[22]

And Bosley's appellate brief said that her motion to enforce settlement "had been withdrawn."[23]

Withdrawing her settlement motion does not affect attaining Kokkonen jurisdiction initially, but it does create the *endpoint* of that purported jurisdiction. The next section of this reply demonstrates that.

VI. The uncontroverted record shows that the district court's assumed jurisdiction to grant Bosley's motion to enforce settlement ended on January 19, 2006.

Bosley mistakenly portrays a hearing brief that WFMJ filed on January 30, 2006 – 11 days after she unconditionally withdrew her motion to enforce settlement – as reviving the district court's assumed Kokkonen jurisdiction.

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[21] Bosley Brf., 1st question.

[22] *Bosley v. WFMJ*, 2007 WL 2050655 at *2.

[23] Bosley appellee brf. at 27, in this reply at 2a.

It did not, and could not. By January 30, nothing could. The case was over, although no one realized it.

The uncontroverted record shows that three events converged 11 days earlier -- on January 19 – to immediately end whatever ancillary Kokkonen jurisdiction the district court could have had.

On that day, Bosley unconditionally withdrew her motion to enforce settlement; she moved for trial on the underlying copyright claims; and WFMJ already had advised the court that neither it nor Bosley could enforce any settlement because the parties had not consummated anything enforceable.[24]

When those developments combined on January 19, there was no pending complaint. There was no judicial command to enforce. There was nothing but a bare recital entered when the court dismissed the case, saying that it retained "continuing" jurisdiction to resolve disputes over settlement.

Thus, after January 19, the district court had nothing left to support the ancillary Kokkonen jurisdiction that it claimed to have. On January 19, 2006, Article III disabled any later attempt to revive federal jurisdiction to enforce an asserted state-law settlement contract between parties of the same state.

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[24] WFMJ memor. #334, 12/16/05; Petition, 54a-63a.

The uncontroverted record shows:

Nov. 26, 2005.

The district court ordered the case dismissed with prejudice and retained continuing jurisdiction over disputes in memorializing settlement, citing Kokkonen.

Dec. 15, 2005.

Bosley moved to enforce settlement.

Dec. 16, 2005.

WFMJ argued that the parties had not consummated a final, enforceable contract, and so opposed Bosley's motion to enforce.[25]

Jan. 19, 2006.

Bosley filed her notice that plaintiffs "hereby withdraw their Motion to Enforce Settlement Agreement Reached on November 23, 2005, which was filed on December 15, 2005" – doc. #346.[26]

Bosley moved separately to vacate the dismissal and to order a trial on the underlying copyright claims – doc. #347.[27]

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[25] WFMJ memor. #334.

[26] Petition, 54a-55a.

[27] Petition, 60a.

Loss of asserted ancillary *Kokkonen* jurisdiction:

> At this point – January 19 – Article III immediately deprived the district court of whatever ancillary Kokkonen jurisdiction it had. Bosley's motion to enforce settlement was no longer justiciable, if it ever had been.

Everything that happened after this point was *ultra vires*.

Here's what happened *after* January 19:

Jan. 20, 2006.

A district court employee designated as "(S, T)" modified the docket text of Bosley's notice withdrawing her settlement motion by adding: "FILED IN ERROR – ATTORNEY TO REFILE AS A MOTION."[28]

Later on Jan. 20.

Bosley refiled the identical "notice" that she had filed on Jan. 19. She did not recast it as a "motion" in any respect – doc. #348. Compare pages 54a and 57a in the appendix to WFMJ's petition.

It turns out that the district court, not Bosley, labeled the second notice as a "motion" on the court docket and not until several days later. Thus:

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[28] Petition, 51a; App. to this brief at 19a.

Jan. 23, 2006.

A district court employee designated as "(S,T)" modified the docket text of Bosley's second notice withdrawing her settlement motion by calling it: "Motion to Withdrawal Document Motion to Enforce Settlement Agreement Reached on November 23, 2005"[29]

The substance of a record trumps its docket description, however.[30] Bosley's second notice withdrawing her settlement motion was exactly that: another notice.

As the Sixth Circuit concluded: "there can be no doubt that the document filed with the district court expresses a unilateral desire on the part of the plaintiffs to withdraw their motion."[31]

Also on Jan. 23.

The court ordered an evidentiary hearing on Bosley's motion to enforce settlement. It set the hearing for eight days later, on January 30 – doc. #349.[32]

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[29] Petition, 51a.

[30] *E.g.*, *Hammond v. Verdini*, 377 F.Supp.2d 296, 297 n.1 (D. Mass. 2005).

[31] *Bosley v. WFMJ*, 2007 WL 2050655 at *2.

[32] Petition, 52a.

Jan. 30, 2006.

The magistrate judge conducted the evidentiary hearing on Bosley's motion to enforce settlement and WFMJ filed the hearing brief described earlier.

April 7, 2006.

The district court denied Bosley's "motion" to withdraw her motion to enforce settlement, and granted the motion to enforce settlement – doc. #397.

The district court did not explain how Bosley could have been advocating that the court should both grant the motion to enforce *and* allow her to withdraw it.

July 13, 2007.

The court of appeals affirmed the district court's orders.

VII. The Sixth Circuit's Article III mootness ruling and the Federal Circuit's contrary ruling in Earth Island Institute v. Albright are irreconcilable.

Bosley has failed to find a way to reconcile the mootness analysis in Earth Island Institute v. Albright with the Sixth Circuit's ruling here.[33]

The differences that she cites are either immaterial or inaccurate. Bosley says that Earth Island did not

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[33] *Earth Island*, 147 F.3d 1352 (Fed. Cir. 1998).

"involve" ancillary jurisdiction.[34] Of course it did. The movant to enforce was asking the trial court to enforce a "final judgment" that commanded the defendant federal government to issue revised regulations.[35] That is quintessential ancillary jurisdiction.

Bosley then tries to reconcile the cases by saying that the trial court in Earth Island had not recited that it "retained" ancillary jurisdiction as the district court did here. While Bosley is technically correct that the Earth Island trial court did not expressly retain jurisdiction, it did not need to. It had entered a final judgment commanding the government to act. Enforcing that command does not require any special retention of ancillary jurisdiction; the ancillary jurisdiction is built-in.

Bosley argues that no Article III controversy existed in Earth Island when the plaintiffs there moved to enforce because the trial court already had issued a final judgment. Yet the same was true of Bosley's motion to enforce settlement here. When Bosley moved to enforce settlement, this case already had been dismissed with prejudice.

Bosley also argues, when the movant in Earth Island unconditionally withdrew its motion to enforce, the parties were no longer disputing and there was nothing for the court there to resolve. Here, she argues, the parties were still disputing the alleged

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[34] Bosley Brf., 15.

[35] *Earth Island*, 147 F.3d 1354.

settlement when she withdrew her motion to enforce it.[36]

Bosley is incorrect. When the plaintiffs in Earth Island withdrew their motion to enforce, they still insisted that the government had not complied with the trial court's order to issue new regulations. A dispute still existed there, just as it did here. But the dispute in Earth Island lost justiciability when the plaintiffs unconditionally withdrew their motion to enforce, as the court of appeals there ruled.

Indeed, the plaintiffs in Earth Island withdrew their motion to enforce to gather more evidence, not because their dispute over the regulations was over. In fact, after the court of appeals ruled, the Earth Island plaintiffs filed a new complaint against the government, continuing the dispute.[37]

Both circuits cannot be interpreting Article III's mootness doctrine correctly. This Court should resolve the issue, especially given the uncertainty of the reach of ancillary Kokkonen jurisdiction.

Correction: Page 12 of WFMJ's petition omitted the citation: Shapo v. Engle, 463 F.3d 641, 643 (7th Cir. 2006).

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[36] Bosley Brf., 15.

[37] *Earth Island v. Daley*, 48 F.Supp.2d 1064, 1065-1066 (1999).

Conclusion

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant WFMJ's petition.

Respectfully submitted,

David L. Marburger
Counsel of Record
Matthew J. Cavanagh
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, Ohio 44114
(216) 621-0200

APPENDIX

APPENDIX 1

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Consolidated Court of Appeals Nos. 06-3091, 06-3624, 06-3625, 06-3626, 06-3894, and 06-3895

[Filed January 17, 2007]

CATHERINE BOSLEY, *et al.*	)
Appellees-Plaintiffs,	)
	)
-v-	)
	)
21 WFMJ, *et al.*	)
Appellants-Defendants.	)
	)

On Appeal From United States District Court for the Northern District of Ohio, Eastern Division

FINAL BRIEF OF APPELLEES-PLAINTIFFS CATHERINE BOSLEY AND RICHARD BROWN

* * *

[p. 27]

* * *

. . . Defendants challenge whether the Magistrate or the district court had the authority to even consider Plaintiffs' Motion to Enforce Settlement after it had been withdrawn. Defendants waived their right to appeal all of these issues due to the untimely objections to the Report and Recommendations. *See* FED.R.CIV.P. 72.

* * *

[p. 35]

At no time, however, did Defendants even suggest that the district court lacked jurisdiction to enforce the settlement. At no time did Defendants question Plaintiffs' efforts to withdraw their Motion to Enforce Settlement or any of the subsequent proceedings resulting therefrom. On the contrary, Defendants remained silent as to this issue and proceeded in full force in an effort to avoid the settlement.

* * *

APPENDIX 2

IN THE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Consolidated Court of Appeals Nos. 06-3091; 06-3624, 06-3625, 06-3626, 06-3894 and 06-3895

On Appeal From U.S. District Court, N.D. Ohio Case No. 04-02529

[Filed January 22, 2007]

CATHERINE BOSLEY, *et al.*	)
	)
Appellees-Plaintiffs,	)
	)
-v-	)
	)
21 WFMJ, *et al.*	)
	)
Appellants-Defendants.	)
	)

Reply Brief of Appellant-Defendant WFMJ Television, Inc.

* * *

[p. 6]

WFMJ's first argument on appeal is that the district court had no subject matter jurisdiction to grant the unconditionally withdrawn settlement motion.[7]

Bosley responds by arguing that the district court correctly resolved the merits of her former motion, virtually avoiding WFMJ's jurisdictional challenge.

* * *

[p. 19]

* * *

E. The district court's reservation of "continuing jurisdiction to resolve disputes" over settlement does not, and cannot, give the court jurisdiction to decide moot issues.

Although the district court here reserved "continuing jurisdiction" to "resolve disputes" over settlement, that did not release the court from the strictures of Article III.

In reserving jurisdiction, the district court cited *Kokkonen*, but *Kokkonen* did not decide the validity or limitations of retaining jurisdiction over settlement when dismissing the underlying merits with prejudice,

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[7] (WFMJ Brf. at 31-33.)

as the district court here did. The dismissal order in *Kokkonen* did not retain jurisdiction over settlement.

In dicta, the *Kokkonen* Court opined parenthetically that the district court could have enforced the settlement if its dismissal order had retained jurisdiction to do that. 511 U.S. at 381. It is that dicta upon which the district court here relied. Ironically, *Kokkonen* emphasized that courts are supposed to follow the "holdings" of Supreme Court cases "rather than their dicta." 511 U.S. at 379.

[p. 20]

Kokkonen's dicta contemplated that retaining jurisdiction over settlement would be valid "if the parties agree" to it. 511 U.S. at 381-382.

The dicta did not say that courts have unfettered power to impose settlement upon the parties *sua sponte*, regardless of whether the parties have a pending motion to resolve settlement issues.

Most importantly, *Kokkonen's* dicta did not, and could not, relax Article III's requirement of a live controversy framed by the parties as the irrevocable condition for exercising judicial power. To the contrary, *Kokkonen's* holding emphasized that enforcing settlement must have "its own basis for jurisdiction," which cannot "be expanded by judicial decree." 511 U.S. at 377, 378. *Kokkonen's* dicta, therefore, did not and could not authorize courts to resolve settlement disputes that are moot.

Indeed, WFMJ has found no case decided after *Kokkonen* where the court found jurisdiction to impose settlement in the absence of a pending motion to enforce, or after receiving notice that the movant was withdrawing or abandoning the settlement motion.

* * *

APPENDIX 3

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Court of Appeals No. 06-3091, consolidated with 06-3624, 06-3625, 06-3626, 06-3894, and 06-3895

CATHERINE BOSLEY,	)
	)
APPELLEES,	)
	)
VS.	)
	)
WFMJ TELEVISION, INC., ET AL.,	)
	)
APPELLANTS.	)
	)

TRANSCRIPT OF PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT,

JUNE 1, 2007.

Proceedings recorded by mechanical stenography, transcript produced by court reporter.

For the Appellees, Catherine Bosley and Richard Brown, Mr. Richard Haber: . . .

* * *

[p. 20]

* * *

The issue -- the parties clearly litigated the controversy of the settlement, and the Court had retained jurisdiction in its dismissal entry in dealing with issues over the memorialization of this settlement.

When the Defendants argue that the Court didn't have jurisdiction to do that under Kokkonen, the Kokkonen decision actually in dicta says the Court retained jurisdiction. It may have been acceptable, but we also believe that what would be necessary is the parties' acceptance of that jurisdiction.

* * *

APPENDIX 4

In The United States Court Of Appeals For The Sixth Circuit

Consolidated Case Nos. 06-3091, 06-3624, 06-3625, 06-3626, 06-3894, 06-3895

[Dated September 4, 2007]

CATHERINE BOSLEY, et al., Plaintiffs-Appellees,	)
vs.	)
WFMJ TELEVISION, INC., et al. Defendants-Appellants.	)

On Appeal From United States District Court, Northern District Of Ohio
Case No. 04-02529

Response Of All Appellants And Their Counsel To Appellees' Motion For Sanctions And Costs

* * *

[p. 13]

* * *

C. The district court's reservation of "continuing jurisdiction" can't negate the dictates of Article III.

When the district court dismissed this copyright case with prejudice, it recited that it "retains continuing jurisdiction to resolve disputes concerning the memorialization" of settlement.[49] As authority for the continuing jurisdiction, the order cited *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994).

In rejecting WFMJ's Article III argument, this Court did not say that it was relying on any "continuing jurisdiction" decided by *Kokkonen*, as indeed it could not.

[p. 14]

"Continuing jurisdiction" means "never-ending" jurisdiction, and the Supreme Court did not decide in *Kokkonen* that Article III authorizes district courts to take it upon themselves to invoke never-ending jurisdiction over potential settlement disputes – normally a province of state courts and state law -- in a nondiversity lawsuit.

The dismissal order contested in *Kokkonen* did not retain any jurisdiction over settlement. In dicta, the

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[49] (Order, #331. J.A. 781.)

Kokkonen Court opined parenthetically that the district court in that case could have enforced the settlement if it had retained jurisdiction to do that.[50] Ironically, *Kokkonen* emphasized that courts are supposed to follow the "holdings" of Supreme Court cases "rather than their dicta."[51]

But what matters most here is that *Kokkonen's* dicta did not say that a district court's reservation of jurisdiction to resolve settlement disputes relaxes the dictates of Article III.

* * *

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[50] *Kokkonen*, 511 U.S. at 381.

[51] *Kokkonen*, 511 U.S. at 379

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 06-3091/ 06-3624/ 06-3625/ 06-3894/ 06-3895/ 06-3626

[Filed November 9, 2007]

CATHERINE BOSLEY, also known as Catherine Balsley, et al.,	)
Plaintiffs -Appellees	)
v.	)
21 WFMJ, et al.,	)
Defendants	)
WFMJ TELEVISION, INC.; MICHELLE NICKS; JOHN URCHEK	)
Defendants -Appellants	)

BEFORE: GIBBONS and COOK, Circuit Judges; and CLELAND, District Judge.*

ORDER

Upon consideration of appellees' motion for sanctions and costs as well as their motion to supplement that motion,

It is **ORDERED** that the motion to supplement the motion for sanctions and costs is hereby **GRANTED**.

It is further **ORDERED** that the motion for sanctions and costs is **DENIED**.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

Issued: November 09, 2007

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* The Honorable Robert H. Cleland, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX 6

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-3091/ 06-3624/ 06-3625/ 06-3894/
06-3895/ 06-3626

[Filed November 28, 2007]

CATHERINE BOSLEY, also known as Catherine Balsley, et al.,	)
Plaintiffs -Appellees	)
v.	)
21 WFMJ, et al.,	)
Defendants	)
WFMJ TELEVISION, INC.; MICHELLE NICKS; JOHN URCHEK	)
Defendants -Appellants	)

MANDATE

Pursuant to the court's disposition that was filed 07/13/2007 the mandate for this case hereby issues today.

COSTS: NONE

Filing Fee.....$
Printing.....$

Total.....$

APPENDIX 7

In The United States Court Of Appeals
For The Sixth Circuit

Court Of Appeals Nos. 06-3091, 06-3624, 06-3625, 06-3626, 06-3894, and 06-3895

[Dated August 30, 2007]

CATHERINE BOSLEY, et al.,	)
	)
Plaintiffs-Appellees,	)
	)
vs.	)
	)
WFMJ TELEVISION, INC., et al.,	)
	)
Defendants-Appellants.	)
	)

Declaration Of David Marburger In Support Of Response Of All Appellants And Their Counsel To Appellees' Motion For Sanctions And Costs

I, David Marburger, declare that the following is true to the best of my knowledge:

1. I am familiar with the use of the United States District Court, Northern District of Ohio's Electronic Case Filing ("ECF") System.

2. All counsel in the above-captioned case, including myself, used ECF for filing documents in the case of *Bosley, et al. v. WFMJ Television, Inc., et al.*, Case No. 04-02529.

3. To electronically file a document with the court, an attorney must do the following:

a. log into ECF with a valid login and password;

b. select the type of document that the attorney wishes to file from a court-provided, drop-down menu of "Attorney Events";

c. the attorney may "modify docket text" by adding the attorney's own text after the "Attorney Event" to better describe the document;

d. enter the case number;

e. designate the party filing the document;

f. import the document and any attachments, which must all be in Adobe Acrobat ("PDF") format; and

g. submit the document by pressing the "Next" button.

4. After the attorney submits the document, the ECF system produces a "Notice of Electronic Filing."

5. The ECF system automatically sends the "Notice of Electronic Filing" to the all attorneys of record by e-mail.

6. The "Notice of Electronic Filing" contains various details describing the filing, including the docket text chosen by the attorney, the assigned docket number, the filing attorney, and the date and time of filing.

7. The filed document appears on the court's electronic docket almost immediately after filing.

8. The "Attorney Event" chosen by the filing attorney appears on the electronic docket in regular font.

9. If the attorney chooses to "modify docket text," any text added by the attorney appears on the electronic docket in italics font.

10. After filing, the court clerk may change the docket text. If the clerk does so, a notation appears on the docket entry. The notation identifies the date of the change, the initials of the clerk employee who made the change in parentheses, and a short description of the change.

11. At 5:45 pm on January 19, 2006, I received a "Notice of Electronic Filing" by e-mail. This notice said that the filed document was a "Notice *of Withdrawal of Motion to Enforce Settlement Agreement Reached on November 23, 2005* filed by all plaintiffs"; that the docket number assigned to that notice was

346; and that the filing attorney was Shannon Polk (Bosley's counsel).

12. The font of the word "Notice" shows that Shannon Polk chose "Notice" from the drop-down menu of "Attorney Events" and then typed in all of the text that appears in italics after the word "Notice."

13. Sometime on the following day, January 20th, Docket No. 346 was modified on the court's electronic docket to read:

01/19/2006	346	FILED IN ERROR - ATTORNEY TO REFILE AS A MOTION - Notice *of Withdrawal of Motion to Enforce Settlement Agreement Reached on November 23, 2005* filed by all plaintiffs. Related document(s)333. (Polk, Shannon) Modified text on 1/20/2006 (S, T). (Entered: 01/19/2006)

14. Based on my knowledge of the ECF system, a clerk employee designated as "(S, T)" modified the docket text by adding the following: "FILED IN ERROR – ATTORNEY TO REFILE AS A MOTION."

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 30, 2007.

/s/
David L. Marburger